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NO.

IN THE
Supreme Court of the United States
October Term, 1982

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CHARLES E. STRICKLAND,
Superintendent
Florida State Prison;
JIM SMITH, Attorney General
of Florida, and LOUIE L. WAINWRIGHT
Secretary, Florida Department
of Corrections,

Petitioners,

vs.

DAVID LEROY WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari
to the United States
Court of Appeals for the
Former Fifth Circuit (Unit B)

BRIEF OF PETITIONER ON JURISDICTION

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QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS IN EXPRESSLY OVERRULING THE SUPREME COURT OF FLORIDA AND EXPRESSLY REJECTING THE EN BANC OPINION OF ANOTHER COURT OF APPEALS, HAS APPLIED THE CORRECT STANDARD FOR REVIEW OF CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL?
2. WHETHER THE COURT OF APPEALS HAS MISAPPLIED FAYERWEATHER v. RITCH, 195 U.S. 276 (1904) TO EXCLUDE A STATE TRIAL JUDGES TESTIMONY OR WHETHER THAT DECISION SHOULD BE OVERRULED OR LIMITED, WHERE THE STATE TRIAL JUDGE TESTIFIES AS AN EXPERT AND AS THE PRESIDING JUDGE, THAT THE NEW EVIDENCE OFFERED BY THE DEFENDANT WOULD MAKE NO DIFFERENCE UPON THE IMPOSITION OF THE DEFENDANT'S SENTENCE.
3. WHETHER THE COURT OF APPEALS CORRECTLY REVERSED THE DENIAL OF THE RESPONDENT'S HABEAS CORPUS APPLICATION WHILE FAILING TO CONSIDER OR APPLY THE PRESUMPTIVE VALIDITY AND FACTUAL FINDINGS OF FOUR STATE COURTS AND THE DISTRICT COURT.
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I

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, is reported at Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982)(Unit B)(Former Fifth)(en banc) (A1-A204)¹. The opinion of the United States District Court for the Southern District of Florida is printed at A250-A292 and is presently unreported.

The opinion of the Supreme Court of Florida is reported at Washington v. State, 397 So.2d 285 (Fla. 1981). (A241-A249). The opinion of the Florida Eleventh Judicial Circuit Court in and for Dade County, Florida, is printed at A205-A240 and is unreported.

¹The symbol "A" designates the pagination in the State's separate Appendix.

The opinion of the Florida Supreme court recognizing the Eleventh Circuit holding herein, but refusing to follow it, is reported at Armstrong v. State, ___So.2d___ (Fla. 1983), Fla.Sup.Ct. Case No. 67,871, opinion filed January 20, 1983 (R293-R321).

II

JURISDICTION

On December 23, 1982, the United States Court of Appeals for the Eleventh Circuit, sitting en banc reversed and remanded the United States District Court's denial of the Defendant's Petition for a Writ of Habeas Corpus. Neither the State nor the Defendant filed a motion for a rehearing.

The jurisdiction of this Honorable Court is invoked pursuant to the specific provisions of Rule 17 of the Rules of the Supreme Court; Title 28 U.S.C. §1254(1)

and Amendments VI and XIV of the United States Constitution.

III

CONSTITUTIONAL AND
STATUTORY PROVISIONS

Amendment VI of the Constitution of the United States provides that:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Amendment XIV of the Constitution of the United States provides inter alia, that:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of

the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Title 28 U.S.C. §2254(a) provides that:

"The Supreme Court, a justice thereof, a circuit judge or a District Court shall entertain an application for a Writ of Habeas Corpus in behalf of a person in custody pursuant to the judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

IV

STATEMENT OF THE CASE

This is a Petition for Certiorari from the opinion of the Eleventh Circuit sitting en banc, in which the Court reversed the denial of the Defendant's Petition for a Writ of Habeas Corpus arising from his state convictions for first degree murder and three sentences

of death in Washington v. State, 362 So.2d 658 (Fla. 1978), cert. den., 441 U.S. 937 (1979). The Defendant confessed and pleaded guilty to all charges. Id. Neither the propriety of his plea nor his confessions are challenged herein. In the present case the Defendant only challenges whether his counsel provided effective assistance at the time of sentencing.

In a ten day period beginning on September 20, 1976, the Defendant committed three of the most brutal murders in Florida's history². Id. at 660-665. On

²A fourth "comatose" victim died subsequent to the original opinion of the Florida Supreme Court. See, Washington v. Strickland, 693 F.2d 1243, at 1247, n 1 (5th Cir. 1982)(A91).

October 1, 1976, the Defendant surrendered to Dade County Police after his two accomplices were arrested for the murder of "Meli." See, Washington v. Strickland, 693 F.2d at 1247 (A5-A6). The Defendant confessed to the Meli killing in a lengthy statement. Id. On October 7, 1976, the State indicted the Defendant for the Meli murder and appointed William Tunkey, an experienced criminal lawyer, to act as his attorney. Id.

On November 5, 1976, the Defendant acting directly against Tunkey's advice, confessed to the "Pridgen" and "Birk" murders. Id. Acting against Tunkey's advice, the Defendant waived his right to a jury trial as to all three murders and pleaded guilty to all charges before the Honorable Richard Fuller. Id. During the plea colloquy, the Defendant stated that he did not have a significant prior

criminal record and explained to Judge Fuller that his actions were the result of extreme stress and anxiety due to his unemployment and his corresponding inability to provide for his family.

A6-A7. The Defendant stated however, that he accepted full responsibility for his crimes. Id. Judge Fuller responded that he had a "great deal of respect for people who are willing to step forward and admit their responsibility." Id.

The Defendant also waived his right to have a sentencing jury. Id. At the sentencing hearing, Tunkey adopted the testimony that the Defendant had given during his plea colloquy and argued that the Defendant's evident remorse and his willingness to face the consequences of his actions should persuade the trial court to impose life imprisonment rather than death. Id. Tunkey also successfully

excluded the Defendant's "rap sheet" from evidence. Id. However, Judge Fuller, found six (6) statutory aggravating circumstances and no statutory mitigation and therefore sentenced the Defendant to death for each killing. Washington, 362 So.2d at 662-664.

Almost five years later represented by different counsel, the Defendant filed a motion for collateral relief pursuant to Rule 3.850 Florida Rules of Criminal Procedure claiming that his counsel was ineffective at the time of sentencing. A8. The primary focus of the Defendant's complaint was Tunkey's "failure" to investigate and fully develop character evidence that might have been presented to Judge Fuller as non-statutory mitigation. A8-A9.

Without conducting an evidentiary hearing, the Florida trial court rejected the Defendant's motion, relying upon the watershed opinion in Knight v. State, 394 So.2d 997 (Fla. 1981)³. Specifically the state trial court found that the affidavits of friends and relatives presented little more information than the Defendant presented himself at the plea colloquy. A221. The state trial court also

³ Knight set a four-step process by which a defendant's claim of ineffective assistance of counsel should be examined:

"In determining whether defendant has been provided with reasonably effective assistance of counsel, we believed the following four-step process encompassed in United States v. DeCoster (DeCoster III), 624 F.2d 196 (D.C. Cir. 1979)(en banc), provides a means to discover a true miscarriage of justice and yet does not place the judiciary in the role interfering with defense counsel's legal and tactical conduct at trial or on appeal. We adopt the following four principles as a standard to whether an attorney has provided reasonably effective assistance of counsel to his client.

found that psychiatric reports presented by the Defendant also would have clearly established elements of the aggravating

"First, the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading."

"Second, the defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel. As was explained by Judge Leventhal in DeCoster III: "to be 'below average' is not enough, for that is self evidently the case half the time. The standard of shortfall is necessarily subjective, but it cannot be established merely by showing that counsel's acts of omissions deviated from a checklist of standards." 624 F.2d at 215. We recognize that in applying this standard, death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstances."

"Third, the defendant has the burden to show that this specific serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings. In the case of appellate counsel, this means the deficiency must

circumstances which the State was required to prove in order to impose the death penalty. Id. Additionally, the witnesses who submitted affidavits were apparently also unaware that the Defendant did have a substantial criminal history. A222-A223.

On appeal the Supreme Court of Florida also rejected the Defendant's claims relying upon Knight v. State, holding that there was no likelihood that the outcome of the cause was

concern an issue which is error affecting the outcome, not simply harmless error. This requirement that a defendant has the burden to show prejudice is the rule in the majority of other jurisdictions."

"Fourth, in the event a defendant does show substantial deficiency and presents a prima facie showing of prejudice, the state still has an opportunity to rebut these assertions by showing beyond a reasonable doubt that there was no prejudice in fact. This opportunity to rebut applies even if a constitutional violation has been established. Chapman v. California, 386 U.S. 18 (1967); DeCoster III." [Emphasis added, footnote omitted]. 394 So.2d at 1000-1001.

affected by the "omissions" the Defendant now claims were the result of ineffective assistance of counsel.

A245-A246. The Court concluded that, "the appellant has failed under the Knight criteria to make a prima facie showing of substantial deficiency or possible prejudice and has failed to such a degree that we believe to the point of moral certainty, that he is entitled to no relief. . ." [Emphasis added]. A247.

Specifically, the Florida Supreme Court observed that even the most zealous advocate could not have saved the Defendant from his fate⁴. A246-A246.

In the United States District Court during the course of the evidentiary

⁴In the State trial court order in denying collateral relief the Court characterized William Tunkey as, "one of the leading criminal defense attorneys in Dade County. . ." (A214).

hearing, Tunkey testified that he chose not to call any witnesses for tactical reasons and because the Defendant did not want anyone there. Judge Fuller testified that the new evidence offered by the Defendant would not change the sentence of death. See, A183-A184 (Tunkey); A282 (Fuller). Relying upon the standard of review in United States v. DeCoster, 624 F.2d 196 (D.C. Cir. 1979)(en banc) ("DeCoster III") and Knight v. State, supra, the United States District Court rejected the Defendant's claims finding that the Defendant had not been prejudiced in any way whatsoever by Mr. Tunkey's actions or inactions. A282-A283. In reviewing the affidavits and "new evidence" proposed by the Defendant, the United States District Court concluded that the proposed evidence, "cannot reasonably be characterized as evidence

of extreme mental or emotional disturbance [n]or does it provide persuasive rationalization for petitioner's extended and calculated course of violence." [Emphasis added].
Id.

The Eleventh Circuit in a sharply divided panel opinion, rejected both Knight and DeCoster and reversed holding that all a defendant need show to establish ineffective assistance of counsel, is that evidence was omitted which might be "helpful to him."
Washington v. Strickland, 673 F.2d 879, at 901-902 (5th Cir. 1982).

On May 14, 1982, the Eleventh Circuit sua sponte vacated the panel opinion and ordered rehearing en banc. 679 F.2d 23 (5th Cir. 1982). Upon en banc rehearing the Eleventh Circuit expressly rejected United States v. DeCoster, (A69-

A72; A79-A80) and "[struck] down the Florida Supreme Court's standard for reviewing the ineffective assistance of counsel claims set forth in Knight v. State" (A189; see also, A11 at n 5). The Court held: 1) that the district court had failed to properly consider the claim that Tunkey was ineffective because he failed to investigate the case; 2) that the court had improperly allocated the burden of proof to the Defendant to show a likely affect upon the outcome of the cause and 3) that the testimony of Judge Fuller was improperly admitted as the mental impressions of the trier of fact⁵. A21-A82.

The present decision has been stayed pending review in this Court. Subsequently, on January 20, 1983, in Armstrong v.

⁵ The en banc court erroneously considered that the State's cross-appeal addressed only the question of the abuse of the Writ. 693 F.2d at 1264, n 34 (A168).

State, ___So.2d___ (Fla. 1983), Fla.S.Ct. Case No. 61,871 (A293-A321) the Florida Supreme Court expressly recognized the Eleventh Circuit's opinion herein but declined to follow it. Instead, the Florida Supreme Court reaffirmed its view that Knight is "constitutionally correct." More than thirty-five (35) states are considering or have agreed to submit an amicus brief in support of the present petition, asking this court to accept review of this matter.

V

REASONS FOR GRANTING THE PETITION

All of the reasons in Rule 17 of the Rules of the Supreme Court and the substantive law are present and warrant the exercise of this Court's jurisdiction in the case at bar.

- A) CONFLICT WITH THE HIGHEST STATE COURT IN THE SAME JURISDICTION AND EXPRESS CONFLICT WITH ANOTHER CIRCUIT

The Eleventh Circuit sitting en banc has expressly and directly rejected the en banc opinion of the District of Columbia Circuit Court of Appeals in DeCoster as the standard of review of ineffective assistance of counsel claims and overruled the Florida Supreme Court in Knight, which relied wholly upon DeCoster in formulating the standard in Florida. In Armstrong v. State, supra, the Florida Supreme Court expressly recognized the present Eleventh Circuit opinion but declined to follow it, reaffirming its view that Knight[6] is "legally and constitutionally" correct. A305-A306.

Upon the face of Armstrong and the present Eleventh Circuit decision, it is

⁶All Florida collateral claims have been reviewed upon the basis of the standard in Knight.

therefore plainly evident that there exists a substantial difference of opinion upon an important federal constitutional question between the highest state court and the highest federal court sitting en banc in the same jurisdiction and a direct conflict with another circuit court sitting en banc on the same federal question. This Honorable Court manifestly has jurisdiction in such a circumstance, see, e.g., Lego v. Twomey, 404 U.S. 477, at 479 n 1, (1972); Anderson v. Maryland, 427 U.S. 463, at 470 n 5 (1976) and should exercise jurisdiction since, "it is clear that the conflict is one that can be effectively resolved only by the prompt action of the Supreme Court alone." Harlan, J., "Some Aspects of the Judicial Process in the Supreme Court of the United States," 33 Australian L.J. 108 (1959).

The importance of the present matter also cannot be gainsaid. As Justice White recently stated, "[a] more fundamental question to the administration of criminal justice in the State and Federal Courts can scarcely be envisioned." Romero v. United States, 31 Crim.L.R. 4035 (1982). Surely, this Court must also place substantial weight upon the importance of this matter, where more than thirty-five (35) states may join Florida in urging this Court to accept review⁷. Finally, for the people of Florida, the burden and chaos engendered by rehearings and retrials would be

⁷At the filing of this brief an amicus brief in support of jurisdiction is being proposed for submission by Montana; Alabama; Arizona; Arkansas; California; Colorado; Delaware; Georgia; Hawaii; Idaho; Indiana; Illinois; Kansas; Kentucky; Louisiana; Maryland; Mississippi; Missouri; New Jersey; New Mexico; Oklahoma; South Dakota; Texas; Utah; Vermont; Virginia; Washington; Wyoming; Massachusetts; South Carolina; West Virginia; Minnesota; Nevada and Ohio.

unconscionable if the Supreme Court of Florida is correct in its views⁸.

B) CONFLICT AMONG OTHER CIRCUITS

Widespread conflict among the circuits and state jurisdictions exists as an additional compelling reason for the exercise of this Court's jurisdiction. Decisions of the First, Second, Fifth, Seventh, Eighth and Ninth circuits, consistent with DeCoster and Knight appear to require that a

⁸On January 25, 1983 the Court accepted Barefoot v. Estelle, 32 Crim.L.R. 4180 (1983) involving stays of execution in collateral proceedings. On February 23, 1983 the Court accepted United States v. Cronin, 32 Cr.L.R. 4193 (1983) involving a claim of ineffective assistance of counsel raised for the first time on direct appeal. The present cause concerning the burden and extent of proof required for claims of ineffective counsel and the admissibility of the testimony of a trial judge is a most timely and appropriate case to be decided with Barefoot and Cronin.

defendant demonstrate that his claims have a likelihood of affecting the outcome of the cause⁹. However, other decisions of those same courts have also applied a minimal showing of prejudice

⁹See, e.g., LiPuma v. Commissioner Department of Corrections, 560 F.2d 84, at 92 (2d Cir. 1977), cert. den., 434 U.S. 861 (1977); United States v. Williams, 575 F.2d 388, at 393 (2d Cir. 1978), cert. den., 439 U.S. 842 (1978); Washington v. Estelle, 648 F.2d 276, at 279 (5th Cir. 1981); Guzzardo v. Benston, 643 F.2d 1300 (7th Cir. 1981); United States v. Cooper, 580 F.2d 259, at 263 n 8 (7th Cir. 1978); United States v. Ingram, 477 F.2d 236, at 240 (7th Cir. 1973), cert. den., 414 U.S. 840 (1973); McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974); Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978) (en banc), cert. den., 440 U.S. 974 (1979); United States v. Altamirano, 633 F.2d 147, at 152-153 (9th Cir. 1980).

requirement ¹⁰. The Third, Fourth, Sixth and Tenth circuits have either presumed prejudice after an initial showing of ineffective counsel or not required any showing of prejudice by a defendant¹¹. In direct contrast, at least twenty (20)

¹⁰See e.g., Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980) (assuming prejudicial error from failure to investigate); United States ex rel. Healey v. Cannon, 553 F.2d 1052, at 1057, n 7 (7th Cir. 1977), cert. den., 434 U.S. 874 (1977) (the harmless error rule is inapplicable to ineffective assistance of counsel claims); Wade v. Franzen, 678 F.2d 56 (7th Cir. 1982).

¹¹See, e.g., Baynes v. United States 687 F.2d 659 (3d Cir. 1982) (any showing of harm requires a new trial); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977) (en banc), cert.den., 435 U.S. 1011 (1978) (assuming prejudice if attorney is not "within the range of competence"); United States v. Gelardy, 567 F.2d 863, at 865 n. 1 (6th Cir. 1978), cert. den., 439 U.S. 842 (1978) (same); United States v. Golub, 638 F.2d 185 (10th Cir. 1980)

states either expressly adhere to the standard in DeCoster and Knight or have centered their analysis of ineffective counsel claims upon a due process and fair trial analysis as to whether a defendant has demonstrated any likely effect upon the outcome of the cause¹². At least another twelve (12) states, while modifying the "farce and mockery"

(proof of specific prejudice is not required); United States v. Porterfield, 624 F.2d 122 (10th Cir. 1980) (no prejudice required).

¹²See, State v. Hyman, 281 S.C.2d 209 (S.C. 1981); Commonwealth v. Borelli, 431 A.2d 1067 (Pa. 1981); Cason v. State, 610 S.W. 2d 891 (Ark. 1981); Baker v. State, 403 N.E. 2d 1069 (Ind. 1980); State v. LePage, 630 P.2d 674 (Idaho 1981); State v. Tucker, 539 P.2d 556 (Idaho 1975); see also, Blackmon v. State, 274 Ark. 202, 623 S.W. 2d 184 (1981); People v. McClure, 190 Colo. 250, 545 P.2d 1038 (1976); Merida v. State, 383 N.E. 2d 1043 (Ind. 1979); Hall v. Commonwealth, 557 S.W. 2d 420 (Ky. 1977); State v. Billiot, 370 So.2d 539 (La. 1979); Lizotte v. State, 247 A.2d 98 (Me. 1968); Berry v. State, 345 So.2d 613 (Miss. 1977); State

standard for review of claims of ineffective counsel, still maintain an outcome oriented, fair trial test¹³.

The apparent conflict with the foregoing decisions also warrants jurisdiction under Rule 17 and the substantive law.

The express purpose of the framers of the Constitution in establishing this Court

v. Miller, 453, 568 P.2d 130 (1977); Seales v. State, 580 S.W. 2d 733 (Mo. 1979); White v. State, 591 P.2d 266 (Nev. 1979); State v. Edge, 57 N.J. 580, 274 A.2d 42 (1971); Zimmer v. Langlois, 95 R.I. 446, 188 A.2d 89 (1963); State v. Brech, 84 S.D. 177, 169 N.W. 2d 242 (1969); Heinlin v. Smith, 542 P.2d 1081 (Utah, 1975); Hoffer v. Peyton, 207 Va. 302, 149 S.E.2d 893 (1966); State v. Johnson, 92 Wash. 2d 671, 600 P.2d 1249 (1979).

¹³See, Risher v. State, 523 P.2d 421 (Alaska 1974); State v. Watson, 653 P.2d 351 (Ariz. 1982); People v. Pope, 152 Cal. Rptr. 732, 590 P.2d 859 (1979); State v. Clark, 170 Conn. 273, 365 A.2d 1167 (1976); People v. Greer, 79 Ill.2d 103, 402 N.E. 2d 203 (1980); People v. Kees, 32 Ill.2d 299 at 305, 205 N.E. 2d 729 (1965); Commonwealth v. Satterfield, 373 Mass. 109, 364 N.E. 2d 1260 (1977); White v. State, 309 Minn. 476, 248 N.W. 2d 281 (1976); Johnson v. State, 620 P.2d

was "to secure the national rights [and] uniformity of Judgmts." Letter from Chief Justice Hughes March 23, 1937, quoting John Rutledge of South Carolina, reprinted in 81 Cong.Rec. 2814-2815 (1937). That supreme purpose of this Court would be properly met by the exercise of jurisdiction herein.

T1 (Okla. Cr. 1980); Orona v. State, 638 P.2d 1077 (N.M. 1982); State v. Sanchez, 652 P.2d 1232 (N.M. 1982); People v. DeGraffenried, 19 Mich. App. 702, 173 N.W. 2d 317 (1969); Benoit v. State, 561 S.W. 2d 810 (Tex. Crim. 1977); State v. Hester, 45 Ohio St.2d 71, 341 N.E.2d 304 (1976); see, also, Seales v. State, 580 S.W. 2d 733 (Mo. 1979) (applying fair trial and Eighth Circuit "reasonable competent attorney" test); Woody v. United States, 369 A.2d 592 (D.C. App. 1977) ("gross incompetence" test applied to claims raised after trial); Harris v. State, 293 A.2d 291 (Del.Sup. 1972) ("genuine and effective representation" test); Schoonover v. State, 218 Kan. 377, 543 P.2d 881 (1973) ("complete absence of counsel" test); Schoonover v. State, 2 Kan. App. 2d 481, 582 P.2d 292 (1978); People v. Garrow, 51 App. Div.2d 814, 379 N.Y.S.2d 185 (1976) ("farce and mockery"); Lewis v. State, 369 So.2d 542 (Ala.App. 1978), cert. den. 367 So.2d 542 (Ala. 1978) ("sham" test); In Re Cronin, 133 Vt. 234, 336 A.2d 164 (1975) ("mockery of justice").

C) CONFLICT WITH UNITED STATES
SUPREME COURT DECISIONS UPON
ISSUES WHICH SHOULD BE DECIDED
BY THIS COURT.

1) Improper Extension Of McMann

In McMann v. Richardson, 397 U.S.
759, 770-771 (1970) in considering only
the validity of a guilty plea following a
coerced confession, the Court in dicta
observed that counsel's advice to plead
guilty should be viewed as to whether the
advice, "was within the range of
competency demanded of attorneys in
criminal cases." Without guidance from
this Court, various courts have extended
the McMann "standard" to all Sixth
Amendment ineffective assistance claims
in general¹⁴. To that end, the Eleventh

¹⁴See, e.g., United States v. Bosch,
584 F.2d 1113, at 1121 (1st Cir. 1978);
Marzullo v. Maryland, 561 F.2d 540, at
543 (4th Cir. 1977) (en banc); Moore v.
United States, 432 F.2d 730, at 736 n. 25
(3d Cir. 1976) (en banc).

Circuit has based its opinion upon the "laundry list" of errors theory of ineffective assistance of counsel as proposed by Judge Bazelon in "DeCoster I"¹⁵ and "DeCoster II",¹⁶ which was specifically rejected by the en banc court in DeCoster III¹⁷. Contrary to the present decision, DeCoster, Knight and the "farce and mockery" decisions¹⁸, focus upon whether a defendant has

¹⁵United States v. DeCoster, 487 F.2d 1196 (D.C. Cir. 1973).

¹⁶United States v. DeCoster, 624 F.2d 300 (D.C. Cir. 1976)

¹⁷See, also, Darcy v. Handy, 351 U.S. 454 at 462-263 (1956) (merely because counsel did not complete a list of things he could do does not establish error in the constitutional sense).

¹⁸See, e.g. United States v. Williams, 575 F.2d 388 at 393 (2d Cir. 1978); United States v. Wight, 176 F.2d 376, at 379 (2d Cir. 1949), cert. den., 338 U.S. 950 (1950); United States v. Ramirez, 535 F.2d 125, at 129 (1st Cir. 1976).

been denied a fundamentally fair trial and thus fundamental due process.

Contrary to the proponents of purely Sixth Amendment analysis¹⁹ this Court has also consistently held that the central consideration upon ineffective counsel claims is whether a defendant has been denied fundamental due process and a fundamentally fair trial. See, United States v. Frady, __ U.S. __, 102 S.Ct. 1584 (1982); Engle v. Isaac, __ U.S. __, 102 S.Ct. 1558 (1982)²⁰.

¹⁹See, e.g. People v. Pope, 23 Cal.3d 412, 590 P.2d 859 (1979) (abandoning "due process" test for a solely Sixth Amendment based test).

²⁰See, also, Smith v. Phillips, __ U.S. __, 102 S.Ct. 940 (1980) (fair trial and fundamental due process claims must be examined from the standpoint of the effect if any upon the outcome of the trial); Kentucky v. Wharton, 441 U.S. 786, at 790-791 (1979) (same); Henderson v. Kibbe, 431 U.S. 145 (1977); United

2) Burden of Proof

With respect to the burden of proof, in Frady, the Court held that in federal collateral proceedings, a defendant must bear a greater burden of proof entirely. 102 S.Ct. at 1593. In a companion case to Frady, in Engle v. Isaac, the Court explained that federal collateral attacks upon final state courts judgments even more strongly necessitate a Defendant carrying the whole burden to show

States v. Agurs, 427 U.S. 97 (1976); Cupp v. McNaughten, 414 U.S. 141, at 146 (1975) ("Before a Federal Court may overturn a conviction resulting from a state trial...it must be established not merely that the [State's action] is undesirable, erroneous; or even 'universally condemned', but that it violated some right which was guaranteed to the defendant by the XIV Amendment"); Chambers v. Maroney, 399 U.S. 42, at 53-54 (1970) (even if counsel was ineffective, the whole record reveals no effect upon the outcome); Darcy v. Handy, 351 U.S. at 462-463; see, also, Rose v. Lundy, ___ U.S. ___, 102 S.Ct. 1198 at 1216 (1982) (Stevens, J., dissenting: the purpose of the writ is to address fundamental unfairness).

constitutional error because of special finality and comity concerns. 102 S.Ct. at 1575.

3) Degree of Proof

With respect to the degree of proof required the most compelling demonstration of both jurisdiction and error is the direct conflict with the seminal decision of this court in United States v. Agurs. Essentially, the Defendant in the present case seeks to overturn the result below with "new evidence" which he claims his counsel failed to produce. In United States v. Agurs, in assessing the effect of "new evidence" upon a claim for a new trial, the court clearly delimited claims of constitutional error based upon the effect upon the outcome of the cause. 427 U.S. at 109-110. More important to our present analysis however, the Agurs court conclusively held that complaints

of error concerning new evidence do not rise to constitutional magnitude unless there is a substantial likelihood that it would have affected the outcome of the cause:

"It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." [footnote omitted; emphasis added]. Id., at 113.

Also consistent with Engle and Frady, the Agurs court additionally held that a defendant has a heavy burden of proof to show that the outcome of a trial would be different when the new evidence is from a "neutral" source (rather than the prosecution) as in the case at bar. Id. at 111.

4) Misapplication of Frady

The Eleventh Circuit in its opinion purports to apply the United States v.

Frady, in rejecting the outcome/fundamental fairness oriented proof explained in DeCoster and Knight. See, A56-A57. The circuit court citing Frady holds that a defendant must show only that the errors he complains of, "worked to his actual and substantial disadvantage." Id. However, this standard is only part of this Court's holding in Frady. Under Frady, a defendant must also show that the errors he complained of were such that they, "infect[ed] his entire trial with error of constitutional dimension" [emphasis added]. 102 S.Ct. at 1596. The Frady court in fact, rejected the defendant's claims because there was no affect upon the outcome of the cause where the evidence against the defendant was overwhelming. 102 S.Ct. at 1596-1597; compare also, United States v. Valenzuela-Bernal, __U.S.__, 102 S.Ct. 3440 (1982)(with respect to Sixth

Amendment claims in deportation proceedings, a defendant must show that his claims would have affected the outcome of the proceedings); Hooper v. Evans, __U.S.__, 102 S.Ct. 2049 (1982). The present decision by the Eleventh Circuit therefore constitutes a complete misreading of United States v. Frady, and a substantial departure from both the Rule in Frady and the proper constitutional analysis of the burden and extent of proof required by the decisions of the United States Supreme Court. To the contrary, the apparent intent of the Eleventh Circuit en banc majority in this cause, is to relax the standard for review of constitutional error, and the Defendant's burden of proof directly in the face of Frady, Agurs and the foregoing authority. Also, by creating "constitutional error" from matters on a

list not related to the outcome of the cause, the en banc court would open a Pandora's Box of reversible error in virtually any cause. The perpetuation of such a vague, semantic jungle undermines the criminal justice system and public confidence in the ability of the system to render certain and final judgments²¹.

D) MISAPPLICATION OF
FAYERWEATHER V. RITCH

The Eleventh Circuit's reliance upon Fayerweather v. Ritch, 195 U.S. 276 (1904), to exclude the testimony of Judge Fuller is a complete departure from Agurs, and the principals therein and constitutes a plainly erroneous reading of Fayerweather. In the present case, Judge Fuller was called upon with respect

²¹For purposes of preservation, the State also vigorously contends here that the Defendant has abused the great writ by his deliberate and calculated delay in presenting his claims. See, A82, n 34.

to the effect of "new evidence", consistent with Agurs. Judge Fuller did only that which he must do under Agurs in evaluating "new evidence" and its effect if any upon the outcome of the proceeding ²². Therefore Fayerweather has been plainly misconstrued or should be overruled.

The Eleventh Circuit has also created a virtually untenable situation for the State in avoiding new trials in federal collateral proceedings. The Defendant may, by only a mere preponderance of the evidence, overturn his conviction, which was established beyond a reasonable doubt. The State is then placed in the position of proving that the Defendants

²²The Eleventh Circuit's analysis also herein totally undercuts the effect of this court's decision in United States v. Tucker, 404 U.S. 443 (1972), which contemplates precisely the present circumstance wherein the trial judge is ordered to reconsider his verdict in terms of a change in the evidence. See, also, Smith v. Phillips, _ U.S. ___, 102 S.Ct. 940 (1982).

conviction should be sustained again beyond a reasonable doubt because there was no affect upon the outcome of the case, without being permitted to produce the best evidence to support such a conclusion. Certainly the trial judge in any circumstance is the best evidence of that event as reflected by this court's analysis in Agurs and similar decisions²³. It is also irrational to suggest that Judge Fuller's testimony would be excluded if he had said that he would not impose the death penalty based upon the new evidence. Therefore, in the present cause this Honorable Court should accept jurisdiction herein based upon a

²³See also, United States v. Tucker, 404 U.S. at 452 (The Chief Justice and Blackmun, J. dissenting: "Surely Judge Harris, of all people is the best source of knowledge as to the effect, if any, of these two convictions in his determination of the sentence to be imposed.")

plain misreading of Fayerweather and erroneous construction of substantial federal constitutional questions.

E) SUBSTANTIAL DEPARTURE FROM
ACCEPTED OR USUAL COURSE OF
JUDICIAL PROCEEDINGS.

Even though the penalty herein may be death, yet another extraordinary review of that penalty is not the function of the habeas corpus writ or this Court and its inferior courts. See, Spenkellink v. Wainwright, 578 F.2d 582 at 613-614 (5th Cir. 1978), cert. den., 440 U.S. 976 (1979). Contrary to Spenkellink the Eleventh Circuit herein has permitted the Defendant to drag the federal courts into the substantive state sentencing process.

Furthermore, contrary to Sumner v. Mata, 449 U.S. 539 (1981) and Townsend v. Sain, 372 U.S. 293 (1963), neither the District Court nor the Circuit Court gave any consideration whatsoever to the presumptively valid determinations by both

the Supreme Court of Florida and the State trial court that Turkey was not ineffective. The federal courts discarded these carefully considered opinions by ignoring them. Is a state judgment going to be set aside simply because a federal court disagrees or is not in philosophical accord with a state judgment or sentence, under the guise of calling it "a mixed question of law and fact?" and then decides the issue de novo²⁴ or are federal courts going to be bound by a standard which restores some semblence of integrity to state court judgments?

The Defendant's claim should have been rejected on the face of the record without any requirement of an evidentiary hearing. The State would therefore urge

24. See, Pullman - Standard v. Swint,
U.S. ___, 102 S.Ct. 1781, at 1789-1791
(1982).

the Court to grant Certiorari on this issue and eliminate the present abuse of the Writ.

VI

CONCLUSION

This Court should accept and decide this issue of compelling national importance.

RESPECTFULLY SUBMITTED on this ____ day of March, 1983, at Tallahassee, Florida.

JIM SMITH
Attorney General

CALVIN L. FOX, Esquire
Assistant Attorney General

82 - 1554

Office: Supreme Court, U.S.

FILED

MAR 21 1983

ALEXANDER L. STEVAS,

NO.

IN THE

Supreme Court of the United States

October Term, 1982.

CHARLES E. STRICKLAND,
Superintendent
Florida State Prison;
JIM SMITH, Attorney General
of Florida, and LOUIE L. WAINWRIGHT
Secretary, Florida Department
of Corrections,

Petitioners,

vs.

DAVID LEROY WASHINGTON,

Respondent.

On Petition for a Writ of Certiorari
to the United States
Court of Appeals for the
Former Fifth Circuit (Unit B)

APPENDIX OF PETITIONER ON JURISDICTION

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A1

David Leroy WASHINGTON,
Petitioner-Appellant,

v.

Charles E. STRICKLAND, Superin-
tendent, Florida State Prison,
Louie L. Wainwright, Secretary
Florida Department of Correc-
tions, and Jim Smith, Attorney
General of the State of Florida,
Respondents-Appellees.

No. 81-5379.

United States Court of Appeals,
Fifth Circuit.*
Unit B

Dec. 23, 1982.

Appeals from the United States District
Court for the Southern District of Florida.

Before GODBOLD, Chief Judge, RONEY, TJO-
FLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON,
HENDERSON, ANDERSON and CLARK, Circuit
Judges.**

*Former Fifth Circuit Case, Section 9(1)
of Public Law 96-452--October 14, 1980.

**Judge Hatchett did not participate in
the consideration or decision of this case.

PER CURIAM:

There follows the opinion of Judge Vance concurred in by Chief Judge Godbold and Judges Kravitch and Henderson. Judge Tjoflat specially concurs by separate opinion in which Judge Clark concurs in part. By separate opinion Judge Johnson joined by Judge Anderson concurs in the substantive portions (Parts I, II-A, III-A, III-B and III-C) of Judge Vance's opinion, but dissents from Parts II-B and III-D, which relate to the disposition of this specific case on remand. As reflected in their respective opinions and concurrences a majority of the court, consisting of Chief Judge Godbold and Judges Tjoflat, Vance, Kravitch, Johnson, Henderson, Anderson and Clark, agree and it is therefore the judgment of the court that the district court's judgment be reversed and the case remanded.

On remand the further proceedings in the district court shall be controlled by Parts I, II-A, III-A, III-B and III-C of Judge Vance's opinion, all of which constitute the opinion of the court.

Judge Roney dissents in a separate opinion concurred in by Judges Hill and Fay. Judge Hill also filed a separate dissenting opinion.

REVERSED and REMANDED.

VANCE, Circuit Judge:

In this opinion the en banc court addresses the proper standards for evaluating a claim of ineffective assistance of counsel based upon allegations of inadequate trial preparation. Petitioner-appellant David Leroy Washington appeals from the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Washington has two primary contentions: (1) that his trial counsel did not

render effective assistance because he failed to investigate, procure, and present character evidence relevant to the sentencing stage of his trial, and (2) that this failure prejudiced Washington in the conduct of his defense. We remand this case to the district court to determine whether trial counsel was ineffective under constitutional standards, and if so, whether Washington suffered actual and substantial prejudice.

I. Factual and Procedural Background

A. State Criminal Proceedings

During a ten-day period in September 1976 Washington committed a series of crimes which included three brutal murders. On September 20, 1976 Washington and an accomplice stabbed to death a minister, David Pridgen. Three days later Washington broke into the house of Mrs. Katrina Birk. After binding Mrs. Birk and her three elderly

sisters-in-law, he shot and stabbed each of them, killing Mrs. Birk and inflicting severe injuries upon the others.¹ Finally, on September 29 Washington kidnapped Frank Meli, a twenty-year-old college student, and tied him to a bed with the help of two accomplices. After an attempt to extort ransom money from Meli's family failed, Washington stabbed him to death. Each of these criminal episodes involved a substantial degree of preparation and each included acts of theft.

On October 1, 1976 Washington surrendered to Dade County police after his two accomplices were arrested for the murder of Frank Meli. He voluntarily confessed to the crime in a lengthy statement to the police. On October 7 the state indicted Washington for the Meli murder and ap-

1. One of the injured women remained unconscious for over a year before she died.

pointed William Tunkey, and experienced criminal lawyer,² to act as his attorney.

On November 5 Washington, acting against Tunkey's advice, confessed to the Pridgen and Birk murders. Additional indictments were returned, and Washington's trial was set for December 1 before Judge Richard Fuller.³ Washington waived his right to a jury trial and, again acting against the advice of Tunkey, pleaded guilty to all charges when he went before Judge Fuller. During the plea colloquy Washington stated that he did not have a significant prior criminal record and explained to Judge Fuller that his actions were the result of

2. In its order denying Washington's motion for postconviction relief, the court for the eleventh judicial circuit of Florida characterized Tunkey as "one of the leading criminal defense attorneys in Dade County. . . ."

3. Tunkey anticipated that the state would attempt to use Washington's conviction in connection with the Pridgen murder to furnish an additional aggravating circumstance

extreme stress and anxiety due to his unemployment and his corresponding inability to provide for his family. Washington stated, however, that he accepted responsibility for his crimes. Judge Fuller responded that he had "a great deal of respect for people who are willing to step forward and admit their responsibility."

Washington also waived his right to have a sentencing jury. At the sentencing hearing on December 6 Tunkey adopted the testimony that Washington had given during the plea colloquy and argued that Washington's evident remorse and his willingness to face the consequences of his actions should persuade the court to impose life imprisonment rather than death. Tunkey also successfully

(Footnote 3 continue) in Birk and Meli cases pursuant to section 921.141(5)(b) of the Florida Statutes. He successfully moved to prevent use of the Pridgen case in this manner. Tunkey also made a motion for a continuance which was denied by Judge Fuller.

of the motion was upon Tunkey's failure to investigate fully and develop character evidence that might have been presented to Judge Fuller as a matter in mitigation. In support of the motion, Washington attached fourteen affidavits from various friends, relatives, and acquaintances who stated that they would have testified on Washington's behalf if his attorney had requested them to do so. He also attached reports from two psychiatrists who stated that "while [Washington] was not under the influence of extreme mental or emotional disturbance, he was chronically frustrated and depressed because of his economic dilemma wherein he was unable to find employment and provide for his wife and children."

The Florida circuit court denied the motion without holding an evidentiary hearing.⁴ It found that Washington had failed

4. With respect to the affidavits, the court found that "the best that could be

to satisfy the test for ineffective assistance of counsel test established in Knight v. State, 394 So.2d 997 (Fla. 1981), which requires a defendant to prove that his attorney's failure was a "substantial and serious deficiency measurably below that of competent counsel," and that the failure caused "prejudice to the defendant

(Footnote 4 continue) said. . . is that these individuals could have testified that the Defendant was a basically good person who had not been in trouble with the law on prior occasions and that he was worried about his family because of his financial difficulties at the time of these murders, a fact that was testified to by the defendant himself at the plea colloquy." The court also found that the new psychiatric reports might actually have harmed Washington's case because they conclusively established the absence of the statutory mitigating circumstance of extreme mental or emotional disturbance. The court stated that the course actually pursued by Tunkey, to put on evidence of emotional distress only during the plea colloquy, served Washington's interests by preventing the state from presenting more damaging evidence in cross-examination or rebuttal. The court particularly noted that numerous assertions in the affidavits that Washington had never committed a crime before the ten-day period in September 1976 could have been thoroughly rebutted by the state.

to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings." *Id.* at 1001 (citation omitted).⁵ On appeal the Florida Supreme Court affirmed, finding that "the appellant has failed under the Knight criteria to make a prima facie showing of substantial deficiency or possible prejudice and has failed to such a degree that we believe, to the point of moral certainty, that he is entitled to no relief under rule 3.850."⁶ *Washington v. State*, 397 So.2d 258, 287 (Fla. 1981).

5. In Knight the Florida Supreme Court drew heavily upon the plurality opinion in *United States v. Decoster*, 624 F.2d 196 (D.C.Cir. 1979) (en banc), in which the court stated:

[T]he accused must bear the initial burden of demonstrating a likelihood that counsel's inadequacy affected the outcome of the trial.

Id. at 208.

6. The panel opinion inadvertently misquoted the Florida Supreme Court and gave the impression that the Supreme Court had only affirmed the circuit court's finding

C. Federal Habeas Proceedings in
District Court

Having exhausted his state remedies, Washington sought habeas corpus relief from the district court below.⁷ Again, the petition attached Tunkey's preparation for the sentencing phase of Washington's trial.

Petitioner called Tunkey as a witness at the evidentiary hearing. Tunkey testified that after Washington confessed to the Pridgen and Birk murders, he experienced a

(Footnote 6 continue) that no prejudice resulted from Tunkey's conduct. See Washington v. Strickland, 673 F.2d 879, 884 (5th Cir. 1982). In fact the Supreme Court affirmed the circuit court's decision on both of its stated grounds: that Tunkey's representation was not seriously deficient and that in any case Washington was not prejudiced.

7. The grounds for relief in addition to the ineffectiveness claim are recounted in the panel opinion. See Washington v. Strickland, 673 F.2d 879, 885-86 n.3 (5th Cir. 1982). One further claim for relief, based upon Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), was raised for the first time at the evidentiary hearing in the district court below. Arguably, therefore, Washington's petition is a "mixed petition" that con-

feeling of "hopelessness" regarding the case, and that he believed there was little chance of Washington avoiding the death penalty. His strategy at that point was to introduce evidence of Washington's emotional distress only during Washington's plea colloquy with Judge Fuller, and there after to rely primarily upon an "attempt to

(Footnote 7 continue) tains both exhausted and unexhausted claims. Generally, mixed petitions must be dismissed without prejudice while the petitioner pursues his unexhausted claims in state court. *Rose v. Lundy*, 455 U.S. ___, ___, 102 S.Ct. 1198, 1199, 71 L.Ed.2d 379 (1982); *Galtieri v. Wainwright*, 582 F.2d 348, 355 (5th Cir. 1978) (en banc). There are, however, exceptions to the exhaustion doctrine. *Id.* at 354. In this case the district court found that Washington's petition came within such an exception, and the State of Florida does not dispute the district court's finding on appeal. Since the exhaustion requirement is a matter of comity rather than a matter of jurisdiction, see *Rose v. Lundy*, 455 U.S. at ___, 102 S.Ct. at 1203-04; *Stinson v. Alabama*, 585 F.2d 748, 748 (5th Cir. 1978), the court of appeals will not dismiss the petition sua sponte in this case. We adopt the conclusion of the panel that the district court properly found that the Gardner claim was without merit. See *Washington v. Strickland*, 673 F.2d at 889 n.5.

convince the judge of Washington's sincerity and frankness in pleading guilty."⁸

Tunkey believed that this strategy might succeed in avoiding the death penalty because Judge Fuller had in other cases acknowledge his respect for people who unqualifiedly admitted their responsibility.

Tunkey also testified that he made little attempt to develop evidence of Washington's emotional distress apart from conversations with Washington in connection with his plea colloquy. Specifically, Tunkey did not follow up on initial telephone conversations with Washington's wife and mother after they had failed to keep appointments with him. Additionally, he did not request a presentence report or a psychiatric investigation because he anticipated that they might reveal information more harmful than helpful to his client.

8. Opinion of district court at 7.

The state called Judge Fuller as a witness. Over the strenuous objection of Washington's counsel, the judge testified that evidence of the type contained in petitioner's fourteen affidavits and two psychiatric reports would not have altered his determination that Washington deserved the death penalty.

The district court stated that the "central issue raised by the allegations is the assertion by petitioner that an adequate independent investigation by trial counsel would have revealed information and witnesses relevant to circumstances which may have mitigated the death sentence imposed."⁹ Relying upon the decision of the former fifth circuit in *Beavers v. Balkcom*, 636 F.2d 114, 116 (5th Cir. 1981), the court held that defense counsel in a capital case has a duty to investigate mitigating evi-

9. *Id.* at 9.

dence irrespective of whether counsel's strategy at trial would require the use of evidence. The court therefore found that Tunkey had made an "error in judgment" by failing to conduct such an investigation thoroughly. It stopped short, however, of finding that Tunkey was ineffective, stating that the Constitution does not require errorless counsel. Rather than deciding whether Tunkey was ineffective, the court found that Washington was not prejudiced by Tunkey's error. In reaching that conclusion, the court held that Judge Fuller's testimony demonstrated that there was no "likelihood that counsel's inaction affected the outcome of the sentence" (Citing *United States v. Decoster*, 624 F.2d 196, 208 (D.C. Cir. 1979) (en banc)).¹⁰

¹⁰. *Id.* at 16-17. The court also stated that it did not consider the testimony of Judge Fuller to be determinative on the issue of prejudice:

[R]ecognizing the potential weakness

D. The Panel Opinion

Washington appealed the judgment below to this court. The majority panel opinion contained three major holdings:

(1) the district court should determine on remand whether Washington's trial counsel

(Footnote 10 continue) of hindsight analysis, I have not treated Judge Fuller's testimony as determinative on the issue of prejudice. Rather, reviewing the proposed character and psychiatric testimony, and weighing it against the detailed record of petitioner's conduct in initiating and carrying out three separate episodes of planned robbery, kidnapping and murder, there does not appear to be a likelihood, or even a significant possibility that the balancing of aggravating against mitigating circumstances under the Florida death penalty statute would have been altered in petitioner's favor. Critically, the character and medical testimony cannot reasonably be characterized as evidence of extreme mental or emotional disturbance. Nor does it provide persuasive rationalization for petitioner's extended and calculated course of violence. Therefore, it is my determination on the critical legal issue, that petitioner was not prejudiced by the inaction which did occur, and was not denied his Constitutional right to effective assistance of counsel, as that standard is defined under present case law.

was ineffective without regard to the prejudicial effect that may have resulted from counsel's errors; (2) the district court, if it finds trial counsel was ineffective, should grant relief if petitioner proves that "but for his counsel's ineffectiveness his trial, but not necessarily its outcome, would have been altered in a way helpful to him," and the state fails to prove that the error was harmless beyond a reasonable doubt; and (3) in assessing the prejudicial impact of the counsel's ineffectiveness, the district court should disregard Judge Fuller's testimony that the additional evidence would not have affected his verdict.

This court chose to reconsider the case en banc in order to determine important questions regarding the duty of trial counsel to investigate and the burden upon a habeas petitioner to demonstrate prejudice

resulting from ineffectiveness of counsel. We determine that under some circumstances when a strategic choice by counsel makes unnecessary a certain line of investigation, it is not required that effective counsel pursue that investigation. We also determine that a habeas petitioner must show that his counsel's ineffectiveness caused "actual and substantial disadvantage" to the conduct of his defense. We remand this case to the district court for further proceedings consistent with this opinion.

II. Ineffectiveness of Counsel

The sixth amendment guarantees to criminal defendants the right to assistance of counsel. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). A vital corollary to this guarantee is the requirement of effective assistance of counsel, that is counsel reasonably likely

to render and render reasonably effective assistance given the totality of the circumstances. See, e.g., *Herring v. Estelle*, 491 F.2d 125, 127 (5th Cir. 1974); *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960), adhered to en banc, 289 F.2d 928 (5th Cir.), cert. denied, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961). See also *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970). A petitioner who seeks to overturn his conviction on grounds of ineffective assistance of counsel must prove his entitlement to relief by a preponderance of the evidence.¹¹ *United States v. Killian*, 639 F.2d 206, 210 (5th Cir.) cert.

11. This burden of persuasion can be phrased alternatively as the burden to rebut the presumption of attorney competence. See *Michael v. Louisiana*, 350 U.S. 91, 101 76 S.Ct. 158, 164, 100 L.Ed.2d 83 (1955); *Cox v. Wyrick*, 642 F.2d 222, 226 (8th Cir.), cert. denied, 451 U.S. 1021, 101 S.Ct. 3013, 69 L.Ed.2d 394 (1981); *United States v. Garcia*,

denied, 451 U.S. 1021, 101 S.Ct. 3014, 69 L.Ed.2d 394 (1981); Mays v. Balkcom, 631 F.2d 48, 52 n. 1 (5th Cir. 1980); Marino v. United States, 600 F.2d 462, 464 (5th Cir. 1979).¹²

A. The Duty to Investigate

Although the fate of a criminal defendant is determined at trial, the course of that trial can be decisively affected by actions of defense counsel in preparing the case. See, e.g., Moore v. United States, 432 F.2d 730, 739 (3d Cir. 1970)

(Footnote 11 continue) 625 F.2d 162, 170 (7th Cir.), cert. denied, 449 U.S. 923, 101, S.Ct. 325, 66 L.Ed.2d 152 (1980).

12. Washington urges us to apply a special set of rules regarding ineffective assistance of counsel to capital cases. The court has rejected similar advice from another petitioner in Washington v. Watkins, 655 F.2d 1346, 1356-57 (5th Cir. 1981), cert. denied, U.S., 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982), and we do so again here. The relevant inquiry in all cases involving claims of ineffectiveness of counsel, irrespective of the degree of punishment that the state seeks to impose, is whether

(en banc). The courts have therefore insisted that effective counsel conduct a reasonable amount of pretrial investigation. See, e.g., *Washington v. Watkins*, 655 F.2d 1346, 1355-56 (5th Cir. 1981),

(Footnote 12 continue) counsel rendered reasonably effective assistance given the totality of the circumstances. The degree of punishment is but one of the totality of circumstances. See also *Gray v. Lucas*, 677 F.2d 1086, 1092 (5th Cir. 1982).

Washington also argues that Tunkey's failure to investigate and present character evidence rendered the imposition of the death penalty unconstitutional under *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In *Lockett* the Supreme Court struck down a procedure which prevented the sentencer from considering aspects of the defendant's character and record as nonstatutory mitigating factors. *Id.* at 604, 98 S.Ct. at 2964. As noted by the court in *Washington v. Watkins*, the Supreme Court cases on the death penalty deal with "procedural flaw[s] in the system of justice," not with alleged flaws in the judgment of counsel. 655 F.2d at 1356. Therefore, Tunkey's failure to investigate or present extensive character evidence does not render the imposition of the death penalty unconstitutional.

cert. denied, ___ U.S. ___, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982); Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903, 100 S.Ct. 1827, 64 L.Ed.2d 256 (1980); Rummel v. Estelle, 590 F.2d 103, 104 (5th Cir. 1979); Gaines v. Hopper, 575 F.2d 1147, 1149-50 (5th Cir. 1978). Ultimately, the courts are concerned that counsels' decisions reflect "informed, professional deliberation" rather than "inexcusable ignorance or senseless disregard of their clients' rights." United States v. Bosch, 584 F.2d 1113, 1122 (1st Cir. 1978).

The amount of pretrial investigation that is reasonable defies precise measurement. It will necessarily depend upon a variety of factors including the number of issues in the case, the relative complexity of those issues, the strength of the government's case, and the overall strategy of

trial counsel. See, e.g., *Washington v. Watkins*, 655 F.2d at 1357; *Wolfs v. Britton*, 509 F.2d 304, 309 (8th Cir. 1975). In Making that determination, courts should not judge the reasonableness of counsel's efforts from the omniscient perspective of hindsight, but rather "from the perspective of counsel, taking into account all of the circumstances of the case, but only as those circumstances were known to him at the time in question." *Washington v. Watkins*, 655 F.2d at 1356.

The role of strategy in the calculus of reasonableness is of particular importance to this case. Tunkey testified that he made a strategic choice to introduce limited character evidence during the plea colloquy and thereafter to rely upon expressions of frankness, sincerity, and remorse to persuade the judge to impose a sentence of life imprisonment. In light of that

strategy, Tunkey would have viewed as unnecessary an extensive investigation into Washington's character. The district court did not evaluate the credibility of Tunkey's testimony or the reasonableness of his strategy in light of available alternatives. Rather, the court concluded that Tunkey was obliged to conduct an extensive investigation of Washington's character irrespective of whether his trial strategy would benefit from such investigation, and cited *Beavers v. Balkcom*, 636 F. 2d at 116, in support of that conclusion. In his dissent from the panel opinion, Judge Roney relied, *inter alia*, upon *Plant v. Wyrick*, 636 F.2d 188, 189-90 (8th Cir. 1980), for an apparently contrary proposition:

When a strategic choice of action makes unnecessary a certain line of investigation, it should not be necessary

for effective counsel to pursue that investigation.

Washington v. Strickland, 673 F.2d 879, 908 (5th Cir. 1982) (Roney, J., dissenting).

The conflicting language in cases such as Beavers and Plant reflects the different factual situations in those cases. Upon close examination, however, the rules of law contained in those cases are broadly consistent. In cases such as Plant, the trial counsel substantially investigated one plausible line of defense which he presented at trial, but did not investigate another line which he had chosen not to pursue at trial.¹³ In this class of cases, counsel made strategic choices of the

13. The allegations of the petitioner in Plant are somewhat confusing. The petitioner apparently alleged that his counsel was ineffective for failing to prepare an alibi defense and relying instead on a defense that conceded petitioner's proximity to the crime but alleged nonparticipation. See also cases cited *infra* note 21.

general type that courts have traditionally respected in order to avoid undue interference with the adversary process. See, e.g., *United States v. Decoster*, 624 F.2d at 208. In cases such as *Beavers*, however, the trial counsel failed to conduct a substantial investigation into any plausible line of defense. In this class of cases counsel did not choose, strategically or otherwise, to pursue one line of defense over another. Instead, counsel simply abdicated his responsibility to advocate his client's cause. See, e.g., *Gomez v. Beto*, 462 F.2d 596, 597 (5th Cir. 1972).

In our canvass of the case law, we have indentified five major lines of cases involving the duty to conduct adequate investigation before proceeding to trial.¹⁴

14. Since the focus of the analysis in this opinion is the extent of investigation appropriate before proceeding to trial, we do not specifically discuss the duty to investigate before advising a client to plead guilty. See, e.g.,

For the benefit of district courts that will confront future claims of ineffective assistance of counsel, we will discuss separately each line of cases and identify the proper role that counsel's strategy plays in the evaluation of the reasonableness of pretrial investigation.

1. Counsel fails to conduct substantial investigation into the one plausible line of defense in the case.

In numerous cases effective counsel would discern only one plausible line of defense to serve his client's interests. Whether that one line of defense is insanity, alibi, or simply putting the government to its proof, effective counsel is obliged to

(Footnote 14 continue) *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). We do, however, draw upon the reasoning of these cases for certain general principles. See *infra* note 21.

conduct a reasonably substantial investigation into that line before proceeding to trial. The failure to perform such an investigation is a clear example of a breach of the duty to investigate.

In Gomez v. Beto, 462 F.2d at 596, the defendant was prosecuted for a burglary that took place in Houston. The defendant contended that he was in San Antonio on the day of the crime and gave his attorneys the names of alibi witnesses. The attorneys failed to contact the witnesses and defendant was convicted. The court granted his motion for habeas corpus relief, stating:

These counsel knew that Gomez had only one possible defense to the charge: that he was in another city when the crime was committed.

....

When a defense counsel fails to investigate his client's only possible

defense, although requested by him to do so ... it can hardly be said that the defendant has had the effective assistance of counsel.

Id. at 597.¹⁵

It is obvious that an attorney can no more make a strategic decision that renders unnecessary an investigation of a defendant's one plausible line of defense than he can make a strategic decision to plead guilty against his client's wishes. See, e.g., *Wiley v. Sowders*, 647 F.2d 642, 649 (6th Cir.), cert. denied, 454 U.S. 1091,

¹⁵. See also *Beavers v. Balkcom*, 636 F.2d 114, 116 (5th Cir. 1981); *Davis v. Alabama*, 596 F.2d 1214, 1218 (5th Cir. 1979), vacated as moot, 446 U.S. 903, 100 S.Ct. 1827, 64 L.Ed.2d 256 (1980); *Wood v. Zahradnick*, 578 F.2d 980, 982 (4th Cir. 1978); *United States v. Moore*, 554 F.2d 1086, 1092-93 (D.C. Cir. 1976), *Brennan v. Blankenship*, 472 F.Supp. 149, 155-57 (W.D.Va. 1979), aff'd mem., 624 F.2d 1093 (4th Cir. 1980). Cf. *Michel v. Louisiana*, 350 U.S. 91, 105, 76 S.Ct. 158, 166, 100 L.Ed. 83 (1955) (Douglas, J., dissenting) (where state procedure deprived counsel of opportunity to raise one dispositive issue, defendant was denied

102 S.Ct. 656, 70 L.Ed.2d 630 (1981); Mullins v. Evans, 473 F.Supp. 1321, 1325 (D. Colo. 1979), aff'd, 622 F.2d 504 (10th Cir. 1980). Cf. Wright v. Estelle, 572 F.2d 1071, 1082 (5th Cir.) (en banc) (Godbold, J., dissenting) (strategic choice by counsel that deprives defendant of his constitutional right to testify, absent knowing waiver by defendant, is not effective assistance of counsel), cert. denied, 439 U. S. 1004, 99 S.Ct. 617, 58 L.Ed.2d 680 (1978). Therefore, permissible trial strategy can never include the failure to conduct a reasonably substantial investigation into a defendant's one plausible line of defense. See Ewing v. Williams, 596 F.2d 391, 398-99 (9th Cir. 1979) (Ely, J., dissenting) ("a complete lack of preparation and investigation [cannot] be deemed to be a 'tactical decision' made by the attorney");

(Footnote 15 continue) his constitutional rights).

Wood v. Zahradnick, 430 F.Supp. 107, 112 (E.D.Va. 1977) (where defenses based upon mental condition were the only plausible line of defense, "the [c]ourt can envision no tactical reason why these defenses were not explored"). aff'd in relevant part, 578 F.2d 980 (4th Cir. 1978).

2. Counsel conducts a reasonably substantial investigation into the one line of defense that is presented at trial.

In this class of decisions we again deal with cases in which effective counsel would discern only one plausible line of defense or in which he chooses to rely upon only one major line of defense. An attorney who conducts a reasonably substantial investigation into that line of defense proves unsuccessful for not having conducted a more extensive investigation. Courts have emphasized that "counsel for a criminal defen-

dant is not required to pursue every path until it bears fruit or until all conceivable hope withers." Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980); Baty v. Balkcom, 661 F.2d 391, 395 n. 8 (5th Cir. 1981); Williams v. Maggio, 679 F.2d 381, 393 (5th Cir. 1982) (Unit A en banc); Cox v. Wyrick, 642 F.2d 222, 226-27 (8th Cir.), cert. denied, 451 U.S. 1021, 101 S.Ct. 3013, 69 L.Ed.2d 394 (1981); United States v. Decoster, 624 F.2d at 210-11. Rather, attorneys must conduct a substantial investigation which includes "an independent examination of the facts, circumstances, pleadings and laws involved." Rummel v. Estelle, 590 F.2d at 104; United States v. Moore, 554 F.2d 1086, 1092-93 (D.C. Cir. 1976).

The question whether counsel conducted a reasonable amount of investigation prior to presenting the one line of defense at

trial does not typically involve strategic choices. Once the choice has been made to rely upon one defense at trial, counsel is of course obliged to make a reasonable, though not necessarily exhaustive, investigation before trial.¹⁶

3. Counsel conducts a reasonably substantial investigation into all plausible lines of defense and choose to rely upon fewer than all of them at trial.

16. The scope of duty to conduct an investigation into defendant's one line of defense may be affected, however, by factors such as the strength of the government's case. See, e.g., *United States v. Katz*, 425 F.2d 928, 930 (2d Cir. 1970). Also, strategy may play a role when counsel reasonably determines that interviewing a certain witness or obtaining a certain report may prove to be more harmful to the defendant's case than it is helpful. See, e.g., *Easter v. Estelle*, 609 F.2d 756, 759 (5th Cir. 1980) (Strategic choice not to open the door to prior crime evidence excuses failure to interview certain witnesses).

In this class of cases effective counsel would discern more than one plausible line of defense to serve his client's interests. Certain of the lines might be presented at trial in tandem. For instance, an attorney might challenge the racial composition of the grand jury venire and raise an alibi defense where both appear to be plausible. Other lines of defense may be contradictory and thus incapable of being presented persuasively in tandem. For instance, an attorney might not present an alibi defense in conjunction with a justifiable homicide defense.¹⁷

17. In this case, for instance, Tunkey testified to the effect that he saw two plausible lines of defense: One based upon emotional distress and the other based upon expressions of sincerity calculated to play upon the judge's known inclination to view such expressions with favor. According to his testimony, he presented a limited version of the first line at the plea colloquy and a full version of the second line at the sentencing hearing.

Before making a strategic choice as to which lines of defense to employ at trial, counsel should ideally conduct a substantial investigation into each potential line. In this way he would be able to assess with a considerable degree of professional accuracy which lines are most likely to succeed at trial. He would be able to discuss thoroughly the options with his client. For these reasons, the American Bar Association has suggested that criminal defense counsel "conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed." American Bar Association, Project on Standards for Criminal Justice, Standards Relating to the Defense Function (App.Draft 1971) [hereinafter referred to as American Bar Association Standards]; see *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.) (applying identical

standard), cert. denied, 393 U.S. 849, 89 S.Ct. 80, 21 L.Ed.2d 120 (1968).

When an attorney makes a strategic choice after satisfying this rigorous and extensive duty to investigate, courts will seldom if ever find that the choice was the result of ineffective assistance of counsel. Our adversary system of justice requires that attorneys be permitted to exercise informed discretion in the conduct of the client's defense. *United States v. Decoster*, 624 F.2d at 208; *United States v. Guerra*, 628 F.2d 410, 413 (5th Cir. 1980), cert. denied, 450 U.S. 934, 101 S.Ct. 1398, 67 L.Ed.2d 369 (1981); *Marino v. United States*, 600 F.2d at 463; *Williams v. Maggio*, 679 F.2d at 393.¹⁸ If an attorney

18. Apart from this reluctance to interfere with the adversary process, there are concrete and sensible reasons why courts will almost invariably defer to the fully informed strategic choice of counsel. No two attorneys will present

makes a strategic choice to rely upon one line of defense rather than another, and that choice is based upon the exercise of professional judgment after a reasonably substantial investigation into all plausible lines of defense, the courts will find ineffective assistance of counsel only if the choice was so patently unreasonable that no competent attorney would have made it. Cf. *United States ex rel. Robinson v. Pate*, 312 F.2d 161, 162 (7th Cir. 1963) (counsel not ineffective because strategic

(Footnote 18 continue) an identical defense, even if they are equipped with perfect knowledge. Advocacy is the art of persuasion; it is not a science. A court in a habeas corpus proceeding. Several stages removed from the heat of battle, is seldom able to determine whether the strategic choices made by counsel were the right ones. See *United States v. Bosch*, 584 F.2d 1113, 1131 (1st Cir. 1978). See also *Wiley v. Sowders*, 647 F.2d 642, 648 (6th Cir.), cert. denied, 454 U.S. 1091, 102 S.Ct. 656, 70 L.Ed.2d 630 (1981); *United States v. Thomann*, 609 F.2d 560, 566 (1st Cir. 1979); *United States v. Katz*, 425 F.2d 928, 930-31 (2d Cir. 1970).

choice was one about which competent attorneys might honestly disagree).

4. Counsel fails to conduct a substantial investigation into one plausible line of defense because of his reasonable strategic choice to rely upon another plausible line of defense at trial.

As observed above, when effective counsel would discern several plausible lines of defense he should ideally perform a substantial investigation into each line before making a strategic decision as to which lines he will employ at trial. This ideal, as expressed in the American Bar Association Standards, is an aspiration to which all defense counsel should strive. It does not, however, represent the constitutional minimum for reasonably effective assistance of counsel. See *United States v. Decoster*, 624 F.2d at 205, 210-11. See also *Cooper v.*

Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 793 (1979); United States v. Moore, 554 F.2d at 1093 (Robb, J., concurring) (both opinions criticize checklist approach to evaluating performance of counsel). Realistically, given the finite resources of time and money that are available to defense counsel, fewer than all plausible lines of defense will be the subject of substantial investigation. Often, counsel will make a choice of trial strategy relatively early in the representation process after conferring with his client, reviewing the state's evidence, and bringing to bear his experience and professional judgment.¹⁹ Thereafter he will concentrate his

¹⁹. We assume here, without deciding, that conferring with one's client and reviewing the state's case constitute the bare minimum amount of investigation that counsel must conduct before he forms his trial strategy.

finite resources on investigating those lines of defense upon which he has chosen to rely.

The choice by counsel to rely upon certain lines of defense to the exclusion of others before investigating all such lines is a strategic choice. See, e.g., *Gray v. Lucas*, 677 F.2d 1086, 1093 (5th Cir. 1982). The basis for judicial deference to such a choice, however, is eroded measurably. See Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 Harv.L.Rev. 1434, 1439 (1965). Whereas a strategy chosen after full investigation is entitled to almost automatic approval by the courts, a strategy chosen after partial investigation must be scrutinized more closely in order to safeguard the rights of criminal defendant.

A strategy chosen without the benefit of a reasonably substantial investigation into

all plausible lines of defense is generally based upon counsel's professional assumptions regarding the prospects for success offered by the various lines. The cases generally conform to a workable and sensible rule: when counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial.²⁰

20. Just as the case law contains apparently contradictory statements regarding trial strategy, see *supra* slip op. at 15849, at ___, so it contains differing statements regarding the legitimate role of assumptions in the course of representation. In *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), two attorneys were appointed to represent the defendants on the morning of trial. The Court found that they were thereby denied assistance of counsel:

It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercise their best judgment in proceeding

In *Washington v. Watkins* the attorney for a defendant charged with capital murder relied primarily upon an alibi defense.

(Footnote 21 continue) to trial without preparation No attempt was made to investigate. No opportunity to do so was given.

Id. at 58, 53 S.Ct. at 60. See also *United States v. Moore*, 554 F.2d 1086, 1092-93 (D. C.Cir. 1976) (counsel's failure to interview witnesses because of their expected response "does not excuse the failure to find out; speculation cannot substitute for certainty"). (footnote omitted).

Clearly, an attorney cannot excuse his total failure to investigate simply because he assumes that there is no way to defend his client. However, when an attorney is in the process of choosing the lines of defense on which he will concentrate his investigative effort, he will often have to use his professional judgment to form assumptions regarding the prospects for success from a certain line of defense. See *Gray v. Lucas*, 677 F.2d 1086, 1093 & n. 4 (5th Cir. 1982) (assumptions regarding the best evidence likely to be derived from interviewing certain character witnesses justified strategic choice not to pursue that investigation); *Plant v. Wyrick*, 636 F.2d 188, 189-90 (8th Cir. 1980) (decision not to pursue a certain line of inquiry was arrived at by "an experienced criminal attorney exercising his professional judgment"). See also cases cited *infra* note 21.

When that defense proved unsuccessful and defendant was sentenced to death, the defendant sought habeas corpus relief because, inter alia, his attorney failed "to investigate the apparent under-representation of blacks on the relevant jury panels" 655 F.2d at 1364. At the evidentiary hearing in district court, the attorney was asked why he failed to conduct this investigation. He responded that based upon his prior experience with juries in Columbus, Mississippi and based upon his observation of the tactics of other attorneys, he assumed that a challenge based upon the racial composition of the jury panels would be "without merit." Id. at n. 36. The court found that in light of these circumstances, counsel's strategic decision to devote his efforts to the alibi defense "was not so ill-chosen that it made [his] overall representation constitutionally ineffective."

655 F.2d at 1364. In numerous other cases, courts have similarly found that a reasonable strategic choice based upon reasonable assumptions makes it unnecessary to investigate other plausible lines of defense that counsel does not rely upon at trial.²¹

21. See, e.g., *Jones v. Kemp*, 678 F.2d 929, 931-32 (11th Cir. 1982) (strategic choice to investigate line of defense based upon lack of possession excuses failure to investigate defense based upon absence of knowledge); *Wilkerson v. United States*, 591 F.2d 1046, 1047 (5th Cir. 1979) (strategic choice to concentrate upon legal challenges where government's evidence was overwhelming excuses failure to perform "fruitless legwork"); *Gray v. Lucas*, 677 F.2d 1086, 1093-94 (5th Cir. 1982) (strategic choice to investigate psychiatric evidence at the expense of character evidence was justified by reasonable assumptions regarding probabilities of success); *Plant v. Wyrick*, 636 F.2d 188, 189-90 (8th Cir. 1980) (failure to interview certain witnesses was a matter of professional judgment where counsel pursued the only defense that offered a significant possibility of success); *Gustave v. United States*, 627 F.2d 901, 906 (9th Cir. 1980) (strategic choice regarding proper allocation of time excuses failure to inquire into racial bias of jury during voir dire); *Reynolds v. Mabry*, 574 F.2d 978, 981 (8th Cir. 1978) (strategic choice to rely upon insanity defense excuses failure to

On the other hand, courts have not hesitated to find counsel ineffective when his

(Footnote 21 continue) investigate defenses relating to circumstances of arrest); *United States v. Ladley*, 517 F.2d 1190, 1194 (9th Cir. 1975) (strategic choice not to pursue certain lines of investigation excused where counsel presented forceful defense); *United States v. Hearst*, 466 F. Supp. 1068, 1087 (N.D.Cal. 1978) (failure to investigate effects of pretrial publicity excused by strategic choice to conduct trial in San Francisco), *aff'd in part, vacated in part*, 638 F.2d 1190, 1195-96 (9th Cir. 1980) (failure by attorney to investigate substantially possibility that hallucinogens affected defendant's behavior excused where on the basis of trial strategy "he devoted his energies to other aspects of [the] defense"), *cert. denied*, 451 U.S. 938, 101 S.Ct. 2018, 68 L.Ed.2d 325 (1981). *Cf. McMann v. Richardson*, 397 U.S. 759, 769-70, 90 S.Ct. 1441, 1448-49, 25 L.Ed.2d 763 (1970) (in advising client whether to plead guilty, counsel necessarily relies upon his "best judgment" of possible defenses and the strength of the state's case); *Bradbury v. Wainwright*, 658 F.2d 1083, 1087-88 (5th Cir. 1981) (failure to investigate fully insanity defense before advising client to plead guilty is not ineffective assistance where partial investigation led attorney to reasonable conclusion that the defense had little chance to succeed); *Jackson v. Estelle*, 548 F.2d 617, 618 (5th Cir. 1977) (same conclusion); *Benson v. United States*, 552 F.2d 223, 225 (8th Cir.) (failure to make independent investigation of facts before advising client to plead guilty is not ineffective assistance when the case against defendant was over-

failure to investigate is not based upon a reasonable set of assumptions or when the strategic choices made by counsel on the basis of those assumptions are not reasonable. The California case of *In re Saunders*, 2 Cal.3d 1033, 88 Cal.Rptr. 633, 472 P.2d 921 (1970), furnishes an excellent illustration. In *Saunders* the defendant participated in an armed robbery which resulted in the murder of a store clerk. He was tried for capital murder and counsel was appointed to defend him. Two months before trial the defendant and his mother informed counsel that the defendant had previously suffered head injuries that resulted in organic brain damage. Although the attorney was aware that this information was relevant to the diminished capacity defense under California law, he never investigated the

(Footnote 21 continue) *whelming*), cert. denied, 434 U.S. 851 98 S.Ct. 164, 54 L.Ed. 2d 120 (1977).

matter. Instead, he relied exclusively upon an argument that defendant did not actually commit the shooting.

The attorney later testified that he failed to investigate the diminished capacity line of defense before trial because he had made a strategic choice to preserve that argument for the clemency hearing. The California Supreme Court overturned the conviction. It found that a reasonable attorney would have recognized that diminished capacity was a very promising line of investigation in light of the information furnished to counsel by defendant and his mother. It also found that a reasonable attorney would not have made the strategic choice to rely upon the weak defense used to the exclusion of the diminished capacity defense.²²

22. See, e.g., *Young v. Zant*, 677 F.2d 792, 798-800 (11th Cir. 1982); *Kemp v. Leggett*, 635 F.2d 453, 454-55 (5th Cir. 1981); *Bru-baker v. Dickson*, 310 F.2d 30, 38-39 (9th

In sum, an attorney who makes a strategic choice to channel his investigation into fewer than all plausible lines of defense is effective so long as the assumptions upon which he bases his strategy are reasonable and his choices on the basis of those assumptions are reasonable.²³

(Footnote 22 continue) Cir. 1962), cert. denied, 372 U.S. 978, 83 S.Ct. 1110, 10 L. Ed.2d 143 (1963).

23. The determination whether strategic choices based upon a set of assumptions are reasonable is a question of fact for the district courts. We suggest only a few factors to inform that determination. First, the experience of the attorney is relevant. An attorney who has handled numerous cases in the criminal field will have formed a more accurate picture of which lines of defense are most likely to succeed. Compare *Kemp v. Leggett*, 635 F.2d 453, 454 (5th Cir. 1981) (attorney with little previous experience fails to interview witnesses and adopts a line of defense "not the most compatible with the facts") with *Washington v. Watkins*, 655 F.2d 1346, 1364 & n. 36 (5th Cir. 1981) (attorney who had observed the tactics of other lawyers in comparable cases reasonably chose not to investigate racial composition of jury venire). Second, when the line of defense actually pursued by counsel was inconsistent with the line

5. Counsel fails to conduct a substantial investigation into plausible lines of defense for reasons other than strategic choice.

(Footnote 23 continue) that was not pursued, counsel's strategic choice to investigate one rather than the other is more likely to be reasonable. When the lines of defense are consistent so that both could be presented at trial, there may be a less compelling reason not to have pursued both prior to trial. Compare *Jones v. Kemp*, 678 F.2d 929, 931-32 (11th Cir. 1982) (strategic choice not to investigate one line of defense is acceptable when presentation of that line at trial would have contradicted defendant's testimony) and *Gray v. Lucas*, 677 F.2d 1086, 1094 (5th Cir. 1982) (strategic choice not to investigate fully one line of defense justified when lawyers could reasonably determine that a jury would find it inconsistent with line actually presented at trial) with *In re Saunders*, 2 Cal.3d 1033, 88 Cal.Rptr. 633, 472 P.2d 921 (1970) (strategic choice not to investigate diminished capacity defense was unreasonable when that defense was stronger than and consistent with the defense actually pursued). Finally, the degree of possible prejudice that might foreseeably result from the strategic choice is a relevant factor. See *Cooper v. Fitzharris*, 586 F.2d 1325, 1330 N. 10 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 793 (1979). Thus, a choice that was "likely to result in prejudice which was foreseeably less severe than that resulting from the chosen course" might

When an attorney fails to conduct a substantial investigation into any of his client's plausible lines of defense, the attorney has failed to render effective assistance of counsel. The attorney equally fails to render effective assistance when he chooses among several plausible lines of defense, thereby excluding certain of them, for no strategic reason.

The clearest example of this breach of the duty to investigate appears in *Gaines v. Hopper*, 575 F.2d at 1147. In that case the attorney's policy against interviewing any witnesses before trial left him "in no

(Footnote 23 continue) be more reasonable than the chosen course. *Id.*

The listed factors are neither exhaustive nor individually determinative in the reasonableness inquiry. Cf. *Washington v. Watkins*, 655 F.2d at 1364 & N. 36 (strategic choice not to investigate racial composition of grand jury venire was reasonable even though that line of defense was not inconsistent with the presented at trial).

better position than his jailed client to evaluate the legal and factual realities of the case" *Id.* at 1149. The attorney did not channel his investigation on the basis of a professional assessment of the prospects for success. Rather, he abandoned his obligation to develop a case for his client. See also *Powell v. Alabama*, 287 U.S. 45, 58, 53 S.Ct. 55, 60, 77 L.Ed. 158 (1932); *United States v. Hinton*, 631 F.2d 769, 780 (D.C. Cir. 1980); *United States v. Porterfield*, 624 F.2d 122, 125 (10th Cir. 1980); *United States v. Bosch*, 584 F.2d at 1122.²⁴

24. A finding by the district court as to whether a choice was strategic is a finding of fact that will be accepted by the court of appeals unless clearly erroneous. *Beckham v. Wainwright*, 639 F.2d 262-66 (5th Cir. 1981). See also *Pullman-Standard v. Swint*, 456 U.S. ___, ___, 102 S. Ct. 1781, 1789-91, 72 L.Ed.2d 66 (1982); *United States v. Cruz*, 581 F.2d 535, 540-41 (5th Cir. 1978) (en banc).

In many cases it will not be clear whether the failure to investigate a line of defense is based upon trial strategy or upon neglect of counsel's professional obligations. Courts presume, in accordance with the general presumption of attorney competence, that counsel's actions are strategic. See, e.g., *Michel V. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 164, 100 L.Ed. 83 (1955); *Marino v. United States*, 600 F. 2d at 463; *Tuttle v. Decker*, 386 F.2d 814, 816 n. 1 (5th Cir. 1967); *Cowens v. Wainwright*, 373 F.2d 34, 34 (5th Cir.), cert. denied, 387 U.S. 913, 87 S.Ct. 1701, 18 L. Ed.2d 635 (1967); *United States v. Aulet*, 618 F.2d 182, 189 (2d Cir. 1980). Cf. *The Supreme Court*, 1976 Term. 91 Harv.L.Rev. 70, 219 (1977) (noting the presumption of strategic choice in sixth amendment cases and suggesting another rule in cases involving the determination of "deliberate bypass").

This presumption can be rebutted, however, when trial counsel testifies credibly at an evidentiary hearing that his choice was not strategic, see, e.g., *Beckham v. Wainwright*, 639 F.2d 262, 265-66 (5th Cir. 1981); *Marzullo v. Maryland*, 561 F.2d 540, 547 (4th Cir. 1977), cert. denied, 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed.2d 394 (1978), or when certain of counsel's actions do not conform to a general pattern of a rational trial strategy. See, e.g., *Batty v. Balkcom*, 661 F.2d at 395; *Nero v. Blackburn*, 597 F.2d 991, 994 (5th Cir. 1979); *United States v. Bosch*, 584 F.2d at 1121-22.

B. The Need for a Remand

In this case the district court stated that Tunkey was obligated to investigate substantially a line of defense based upon emotional distress irrespective of whether Tunkey's trial strategy made that investigation necessary. The district court's legal pre-

mise was incomplete. If, in fact, there was more than one plausible line of defense in the case; if Tunkey made a strategic choice based upon reasonable assumptions to pursue one line of defense at the expense of another; and if that strategic choice was reasonable, Tunkey did not breach his duty to investigate.

When district courts fail to make findings or do so on the basis of an erroneous perception of the law, courts of appeals ordinarily remand the case "unless the record permits only one resolution of the factual issue." *Pullman-Standard v. Swint*, 456 U.S. ___, ___, 102 S.Ct. 1781, 1791-92, 72 L.Ed.2d 66 (1982). In this case numerous factual issues remain to be resolved by the district court before it can be determined with certainty whether counsel was reasonably effective. We therefore remand this case for it to make findings on these factual issues.

III. The Showing of Prejudice

If the district court finds on remand that Washington's right to effective assistance of counsel was violated, it should then separately determine whether Washington suffered prejudice of sufficient magnitude to warrant granting the writ of habeas corpus. We decide that the petitioner has the burden of persuasion to demonstrate that the ineffective assistance created not only "a possibility of prejudice, but that [it] worked to his actual and substantial disadvantage." See *United States v. Frady*, 456 U.S. ___, ___, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816 (1982) (emphasis in original).²⁵

25. In *Frady* Justice O'Connor employed that test to determine whether the petitioner had established prejudice within the meaning of the "cause and prejudice" formulation of *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S.Ct. 2497, 2506, 53 L.Ed.2d 594 (1977). For reasons discussed *infra*, we decide that this formulation of the petitioner's burden is an equitable allocation of the burden of proof between the petitioner and the state in cases of ineffective assistance of counsel.

If he successfully satisfies this burden, the writ must be granted unless the state proves that counsel's ineffectiveness was harmless beyond a reasonable doubt. See *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). We proceed to examine the basis for this holding.

A. The Need for a Prejudice Requirement

We are confronted at the outset with Washington's contention that the court should find ineffective assistance of counsel prejudicial per se. Under petitioner's proposed rule, the writ would issue automatically upon petitioner's showing of ineffective assistance. In support of this rule, Washington cites numerous cases including *Gideon v. Wainwright* 372 U.S. at 335, 83 S.Ct. 729, *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976), and *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333, (1980). We

find that these cases are instantly distinguishable.

In *Gideon v. Wainwright* the state refused to appoint counsel to assist in the defense of an indigent defendant. This absolute deprivation of the right to counsel is so inherently prejudicial that the courts will not conduct a particularized inquiry into whether harm was realized in a particular case. See *Chapman v. California*, 386 U.S. at 43, 87 S.Ct. at 837 (Stewart, J., concurring).

In *Geders* the trial court ordered a defendant not to consult with his attorney during an overnight recess after his direct examination and before his cross-examination. While the defendant did not suffer a total deprivation of the right to counsel, the trial court's action constituted direct state interference with important aspects of the attorney's representation of his

client. See also *Herring v. New York*, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975); *Brooks v. Tennessee*, 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972); *Ferguson v. Georgia*, 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961); *Powell v. Alabama*, 287 U.S. at 45, 53 S.Ct. 55. Although such limited interference is not inherently prejudicial, a rule of automatic reversal serves to deter the state from engaging in action that poses a direct threat to the defendant's right to effective assistance of counsel. See *United States v. Decoster*, 624 F.2d at 201.

Finally, in cases such as *Cuyler* the defendant was represented by an attorney who functioned under an actual conflict of interest. This impediment to effective representation was neither inherently prejudicial nor the product of direct state interference in the representation process. The

Supreme Court granted automatic reversal, however, because the subtle and pervasive effect of conflicting loyalties upon an attorney would necessarily make any inquiry into prejudice an exercise in "unguided speculation." *Holloway v. Arkansas*, 435 U.S. 475, 491, 98 S.Ct. 1173, 1182, 55 L.Ed.2d 426 (1978); see *Glasser v. United States*, 315 U.S. 60, 75-76, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942).

In this case Washington did not suffer the inherent prejudice that attended the total deprivation of counsel in *Gideon*. Nor does he complain of state interference in the attorney-client relationship as was evident in *Geders*. Rather, he contends that the attorney provided to him by the state, a competent and experienced criminal lawyer, rendered assistance that was below the standard of reasonably effective counsel. Unlike the defendant in *Cuyler*, Washington

does not contend that this ineffective-ness resulted from any subtle or pervasive impediment to Tunkey's performance. Rather, he contends that Tunkey committed several discrete errors of omission and commission that reasonably effective counsel would not have committed. The process of identifying and the evaluating the effect of these individual errors is not an exercise in "un-guided speculation." Rather, the inquiry into whether these errors resulted in harm is a task that the district courts are well suited to perform. See *Davis v. Alabama*, 596 F.2d at 1222-23; *United States v. Decoster*, 624 F.2d at 201-03 (plurality opinion), 257-58 (Robinson, J., concurring); *Cooper v. Fitzharris*, 586 F.2d at 1332; *United States ex rel. Green v. Rundle*, 434 F.2d 1112, 1115 (3d Cir. 1970). See also *Chambers v. Maroney*, 399 U.S. 42, 54, 90 S.Ct. 1975, 1982, 26 L.Ed.2d 419 (1970)

(relief for ineffective assistance of counsel denied where "the claim of prejudice was without substantial basis").²⁶ Accordingly, we conclude that no Supreme Court decision requires a finding of per se prejudice in this type of case. We also perceive several strong considerations that militate against creating such a rule.

First, a rule of per se prejudice would be contrary to the teachings of *United States v. Morrison*, 449 U.S. 361, 364-65, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981), that the remedy for a violation of defendant's right to adequate assistance of counsel should be tailored to the harm caused by that violation. The defendant in *Morrison* demonstrated "no prejudice of any kind"

26. There may be cases in which the ineffectiveness of counsel is so pervasive that a particularized inquiry into prejudice would be "unguided speculation." See, e.g., *United States v. Porterfield*, 624 F.2d 122, 125 (10th Cir, 1980). This is certainly not such a case.

and the Court found:

There is no effect of a constitutional dimension which needs to be purged to make certain that respondent has been effectively represented and not unfairly convicted. The Sixth Amendment violation, if any, accordingly provides no justification for interfering with the criminal proceedings against [defendant].

Id. at 366-67, 101 S.Ct. at 669. Washington's proposed rule of per se prejudice would require the unwarranted interference in criminal proceedings that Morrison expressly forbids.²⁷

27. It is not difficult to imagine the absurd and unjust results of a rule of automatic reversal. In *United States v. Winston*, 613 F.2d 221 (9th Cir. 1980), the court found that petitioner's trial counsel was arguably ineffective because of his failure to obtain a psychiatric report. The petitioner had been acquitted, however, on the one court to which the report was relevant. The court found, therefore, that petitioner had not been

Additionally, a rule of per se prejudice is especially inappropriate in the case of ineffective assistance because the state is not responsible for the violation of the petitioner's rights. Since the rule would not serve to deter the state from any unconstitutional course of action, the sole effect of the rule would be to bestow an undeserved windfall upon criminal defendants who were not harmed by the errors of their attorneys. See Note, *supra*, at 1436-37.²⁸

(Footnote 27 continue) prejudiced by counsel's ineffectiveness, and refused to grant the writ. *Id.* at 223. Washington's proposed rule would require granting the writ in that situation.

28. See also *McQueen v. Swenson*, 498 F.2d 207, 219 (8th Cir. 1974). Indeed, even when the state shares responsibility for interfering with the effectiveness of petitioner's counsel or with the presentation of his case, the courts will often require an inquiry into whether prejudice resulted. See, e.g., *United States v. Valenzuela-Bernal*, 458 U.S. ___, ___, 102 S.Ct. 3440, 3449-50, 73 L.Ed.2d 1193 (1982); *Hopper v. Evans*, 456 U.S. ___, ___ & n. *, 102 S.Ct. 2049, 2054 & n. *, 72 L.Ed.2d 367 (1982); *United States v. Morrison*,

Finally, the proposed rule would distort the function of the writ of habeas corpus under 28 U.S.C. § 2254. The writ exists to redress fundamental unfairness in state criminal proceedings. *Rose v. Lundy*, 455 U.S. ___, ___, 102 S.Ct. 1198, 1216, 71 L.Ed.2d 379 (1982) (Stevens, J., dissenting). See also *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. ___, ___, 102 S.Ct. 3231, 3239-40, 73 L.Ed.2d 928 (1982). A particularized inquiry must be made in cases of ineffective assistance of counsel to determine whether the fundamental unfairness that the writ was intended to redress exists in an individual case. See *Nelson v. Estelle*, 642 F.2d 903, 906 (5th Cir. 1981); *United States v. Decoster*, 624 F.2d at 207.

B. Allocation of the Burden of Proof

(Footnote 28 continue) 449 U.S. 361, 364-66 & n. 2, 101 S.Ct. 665, 667-69 & n. 2, 66 L.Ed.2d 564 (1981).

1. The Chapman Standard

Having determined that there must be a showing of prejudice, it remains for us to allocate the burden of proof on this issue. For many constitutional violations the existence of prejudice is presumed, and the state can rebut it only upon a showing of harmlessness beyond a reasonable doubt.

See *Chapman v. California*, 386 U.S. at 24, 87 S.Ct. at 828.²⁹ In certain respects,

29. At least one judge has suggested that Chapman itself requires some showing of prejudice by the defendant before the burden of showing harmlessness beyond a reasonable doubt shifts to the state. See *United States v. Decoster*, 624 F.2d 196, 237 (D.C. Cir. 1979) (en banc) (MacKinnon, J., concurring).

The supreme Court has in some instances required a positive showing of prejudice by a defendant before it will grant relief for an alleged violation of a constitutional right. See, e.g., *United States v. Valenzuela-Bernal*, 458 L.Ed.2d 1193 (1982) (compulsory process clause); *United States v. Agurs*, 427 U.S. 97, 104, 96 S.Ct. 2392, 2397-98, 49 L.Ed.2d 342 (1976) (due process clause); see *Coles v. Peyton*, 389 F.2d 224, 230 (4th Cir.) (Craven, J., dissenting) (discussing *Estes v. Texas*, 381

however, the violation of a defendant's right to effective assistance of counsel is sui generis. See, e.g., *McQueen v. Swenson*, 498 F.2d 207, 218 (8th Cir. 1974). The violation is not caused by the state. Consequently, the harsh burden of proof in *Chapman*, which is meant to prevent the state from benefiting from its own wrongs, does not serve the same equitable and deterrent function in cases of ineffective assistance of counsel. *Id.* at 219. Additionally, where ineffectiveness is predicated upon the failure of counsel to raise certain objections, application of the *Chapman* rule would relieve petitioner of the requirement that he show prejudice before he can raise those

(Footnote 29 continue) U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965)), cert. denied, 393 U.S. 849, 89 S.Ct. 80, 21 L.Ed.2d 120 (1968). Cf. *Chambers v. Maroney*, 399 U.S. 42, 54 90 S.Ct. 1975, 1982, 26 L.Ed.2d 419 (1970) (alleged violation of right to effective assistance of counsel denied where "the claim of prejudice ... was without substantial basis").

objections on collateral review. *Cooper v. Fitzharris*, 586 F.2d at 1333. See generally *United States v. Frady*, 456 U.S. at ___, 102 S.Ct. at 1596.³⁰ Alternatively, when counsel is faulted for his failure to

30. If this court were to offer a significantly more favorable procedural posture to claims of ineffective assistance than to other habeas claims, we would establish a perverse incentive to present alleged trial errors as ineffective assistance claims. This incentive would tend to undermine the "cause and prejudice" requirement in *Wainwright* and *Frady*, see *Tague*, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work To Do*, 31 *Stan.L. Rev.* 1, 63-64 (1978); *Strazzella*, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 *Ariz.L.Rev.* 443, 479 (1977), and encourage the filing of frivolous ineffectiveness claims in an attempt to obtain enhanced procedural advantages. See *Cooper v. Fitzharris*, 586 F.2d 1325, 1329-30 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974, 99 S. Ct. 1542, 59 L.Ed.2d 793 (1979).

The case law has generally recognized a rough congruence between the showing of prejudice necessary to avoid procedural default under *Wainwright* and the showing of prejudice necessary to obtain a new trial for ineffective assistance of counsel. See, e.g., *Jurek v. Estelle*, 593 F.2d 672, 680-84 (5th Cir.), vacated, 597 F.2d 590 (5th Cir. 1979), rehearing en

develop and present a certain line of evidence, application of the Chapmen rule would require the state to prove that the failure to produce certain evidence was harmless beyond a reasonable doubt, even though the evidence is more readily accessible to the petitioner. See *United States v. Valenzuela-Bernal*, 458 U.S. ___, ___, 102 S.Ct. 3440-3448-49, 73 L.Ed.2d 1193 (1982); *United States v. Decoster*, 624 F.2d at 228 (MacKinnon, J., concurring); *Coles v. Peyton*, 389 F.2d at 230 (Craven, J., dissenting).³¹

(Footnote 30 continue) banc, 623 F.2d 929 (5th Cir. 1980) (issue of interplay between Wainwright and substantive prejudice requirement not reached), cert. denied, 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981); *Canary v. Bland*, 583 F.2d 887, 890 (6th Cir. 1978). See also *Wainwright v. Sykes*, 433 U.S. 72, 98, 97 S.Ct. 2497, 2512, 53 L.Ed.2d 594 (1977) (White, J., concurring).

31. If in a given case the petitioner does not have access to the information necessary to sustain his burden of proof, the district court is of course free to make appropriate adjustments in the allocation of the burden. See, e.g., *United*

For these reasons, we believe that application of the Chapman standard without an initial showing of harm by the petitioner would be ill-advised.

2. The Decoster Standard

In *Wright v. Estelle*, Chief Judge Godbold stated:

In this circuit, we have consistently held that one suffering inadequate counsel need not show to receive a new trial that adequate counsel would change the result on retrial.

572 F.2d at 1084 (Godbold, J., dissenting). The plurality opinion in *United States v. Decoster*, however, requires the petitioner to prove precisely that. 624 F.2d at 208, 211-12; see *supra* note 5. We reject the outcome-determinative test in *Decoster* for reasons analogous to those that lead us to

(Footnote 31 continue) *States ex rel. Green v. Rundle*, 434 F.2d 1112, 1115 (3d Cir. 1970).

reject the Chapman standard. First, in cases where the allegation of ineffective assistance is based upon counsel's failure to raise certain objections, the Decoster test requires the petitioner to carry a burden of showing prejudice that is different from and greater than the analogous burden in the "cause and prejudice" formulation of *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S.Ct. 2497, 2506, 53 L.Ed.2d 594 (1977). Application of the Decoster rule may thus have the surprising result of holding a petitioner who has established a deprivation of his constitutional right to effective assistance of counsel to a greater showing of prejudice than if he was merely trying to present a claim of constitutional error not raised in the state courts.³²

32. See *supra* note 25 regarding the general congruence between the showing of prejudice to avoid procedural default and the showing necessary to obtain a new trial for violation of the right to effective

Additionally, when counsel is faulted for failing to develop a certain line of evidence, Decoster would require the petitioner to demonstrate, first, what evidence would have been produced and, second, that in the context of the entire case the additional evidence would have altered the result. While the first showing is properly allocated to the petitioner because he is better situated to show what evidence could be uncovered in his favor, he is no better situated than the state to demonstrate that the new evidence was likely to alter the outcome of the case. We believe that where the petitioner has shouldered the considerable burden of showing a violation of his sixth amendment rights that resulted in actual and substantial disadvantage to his case, it is inequitable to encumber him with

(Footnote 32 continue) assistance of counsel. See also the Supreme Court, 1976 Term, 91 Har.L.Rev. 70, 219-21 (1977).

the further responsibility of showing that the disadvantage determined the outcome of the entire case. See *McQueen v. Swenson*, 498 F.2d at 220.

3. The Panel Majority

The panel majority attempted to steer between the Scylla and Charybdis of Chapman and Decoster by imposing upon the petitioner the burden of showing that "but for his counsel's ineffectiveness his trial, but not necessarily its outcome, would have been altered in a way helpful to him." *Washington v. Strickland*, 673 F.2d at 902. We are now convinced that this standard does not represent a significant improvement upon the Chapman standard. A decision of the Supreme Court handed down shortly after the publication of the panel opinion discussed the practical effect of a prejudice standard similar to the panel majority's standard. In *United States v. Valenzuela-Bernal* the

defendant claimed that the government violated his rights under the compulsory process clause of the sixth amendment by deporting individuals who would have offered testimony in his defense. The court of appeals overturned his conviction after the defendant made a showing that the witnesses' expected testimony was of "conceivable benefit" to the defendant. The Supreme Court characterized this test as a virtual per se rule:

Given the vagaries of a typical jury trial, it would be a bold statement indeed to say that the testimony of any missing witness could not have "conceivably benefited" the defense. To us, the number of situations which will satisfy this test is limited only by the imaginations of judges or defense counsel.

458 U.S. at ___, 102 S.Ct. at 3446 (footnote omitted).

We believe it is equally true given the "vagaries of a typical jury trial" that virtually any new piece of favorable evidence produced by a petitioner at a habeas hearing may be "helpful to him." We therefore reject the test of the panel majority.

4. Actual and Substantial Detriment

The test for prejudice in Frady suggests the proper allocation of the burden of proof on the issue of prejudice. In order to sustain that burden, the petitioner must show that ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of his defense. This burden is of sufficient magnitude to discourage the filing of insubstantial claims and to focus the attention of the district court on the actual harm suffered by the petitioner as a result of his counsel's performance. At the same time, the burden does not require

the petitioner to produce evidence to which he is unlikely to have access. It also properly reserves for the state the ultimate burden of showing that any constitutional error that did occur was harmless beyond a reasonable doubt. Thus, even if the defense suffered actual and substantial disadvantage, the state may show in the context of all the evidence that it remains certain beyond a reasonable doubt that the outcome of the proceedings would not have been altered but for the ineffectiveness of counsel. See generally *Chapman v. California*, 386 U.S. at 24, 87 S.Ct. at 828.

C. Testimony of Judge Fuller

In reaching its decision that Washington did not suffer prejudice, the district court considered testimony from Judge Fuller, the state trial judge who imposed the death penalty. The district court could properly consider that testimony to the extent that

it contains personal knowledge of historical facts or expert opinion. See 10 J. Moore & H. Bendix, Moore's Federal Practice § 605.02 (1982). We decide, however, that the portion of Judge Fuller's testimony in which he explained his reasons for imposing the death sentence and his probable response to the evidence adduced at the habeas hearing is inadmissible evidence that may not be considered by the district court.

It is a firmly established rule in our jurisprudence that a judge may not be asked to testify about his mental processes in reaching a judicial decision. In *Fayerweather v. Ritch*, 195 U.S. 276, 25 S.Ct. 58, 49 L.Ed. 193 (1904), the Supreme Court held:

[T]he testimony of the trial judge, given six years after the case had been disposed of, in respect to matters he considered and passed upon, was obviously incompetent.

True, the reasoning of the court for the rule [prohibiting testimony by jurors] is not wholly applicable, for as the case was tried before a single judge there were not two or more minds coming by different processes to the same result. Nevertheless no testimony should be received except of open and tangible facts--matters which are susceptible of evidence on both sides. A judgment is a solemn record. Parties have a right to rely upon it. It should not lightly be disturbed, and ought never to be overthrown or limited by the oral testimony of a judge or juror of what he had in mind at the time of the decision.

Id. at 306-07, 25 S.Ct. at 67-68. See also United States v. Crouch, 566 F.2d 1311, 1316 (5th Cir. 1975).

There are several strong policy reasons that counsel continued adherence to this rule.

First, such testimony poses special risks of inaccuracy. The testimony is often given several years after the fact and a judge is unlikely to be able to reconstruct his thought processes accurately over such a span of time. Second, the finality and integrity of judgments would be threatened by a rule that enabled parties to attack a judgment by probing the mental processes of a judge. Similar considerations underlie the rule against probing the mental processes of jurors. See *United States v. D'Angelo*, 598 F.2d 1002, 1004-05 (5th Cir. 1979); Fed. R.Evid. 606(b).

Finally, a rule that allows the probing of the mental processes of a state judge would exacerbate certain problems that are already inherent in the habeas corpus context. The tendency of the habeas proceeding to detract from "the perception of the trial of a criminal case in state court as a deci-

sive and portentous event," *Wainwright v. Sykes*, 433 U.S. at 90, 97 S.Ct. at 2508, is enhanced by the prospect that the state trial judge may be called into federal court several years later to recreate his though processes at the criminal trial. Additionally, the friction between the state and federal systems of justice can hardly be alleviated by a rule that permits the parties to interrogate a state judge in federal court regarding the basis for his decision. See, e.g., *Rose v. Lundy*, 455 U.S. at ___, 102 S.Ct. at 1203; *Sumner v. Mata*, 449 U.S. 539, 550 & n. 3, 101 S.Ct. 764, 771 & n. 3, 66 L.Ed.2d 722 (1981).

D. The Need for a Remand

The district court purported to apply the test in *Decoster* to determine that the petitioner failed to sustain his burden of showing prejudice. It also considered testimony from Judge Fuller regarding his mental pro-

cesses in reaching his verdict. Since we reject the Decoster rule and find that one portion of Judge Fuller's testimony was inadmissible, it is necessary to remand the case to the district court for further findings. See *Pullman-Standard v. Swint*, 456 U.S. at ___, 102 S.Ct. at 1791-92.

V. Conclusion

On remand, the district court should initially determine whether Washington's right to effective assistance of counsel was violated. If the district court finds a violation, it should then determine whether the petitioner suffered actual and substantial detriment to the conduct of his defense.³³ Finally, if the petitioner meets

33. Our acceptance of the rule that the ineffective counsel question and the prejudice question are distinct inquiries, *Washington v. Watkins*, 655 F.2d at 1359 n. 23, may seem to imply that there is a bright line between the two. We recognize, however, that such is not always the case. Claimed errors of omission or

this twin burden, the district court must determine whether, in the context of the entire case, the detriment suffered was

(Footnote 33 continue) commission arise in a wide variety of circumstances sometimes resulting in substantial imbrication.

On occasion it may be perfectly clear that an omitted act or a potential line of inquiry would not have benefited the defendant. The evinced absence of prejudice then mitigates the need for inquiry into the effectiveness of counsel. (Indeed, manifest absence of benefit to defendant may have been the reason for its abandonment by effective counsel). We do not suggest that when it is apparent that no prejudice resulted from a claimed act or omission, and a habeas court so finds, that it commits reversible error by failing to record specific findings with respect to the effectiveness inquiry. We also do not suggest that under all circumstances the stated order or consideration of the two issues will be the more orderly or logical.

As we have determined above, however, constitutional deprivation of the assistance of counsel is not shown until prejudice also is shown, when as here the claimed ineffectiveness consists of counsel's errors of omission or commission.

In additional to being analytically sound, separate and distinct findings on the two issues provide a practical advantage during the apparently inevitable appeal. In many cases they may avoid the necessity of a remand for further findings.

harmless beyond a reasonable doubt.³⁴ The district court may, in its discretion, conduct further proceedings.

34. As noted above the petitioner raised fourteen legal challenges to the death sentence in addition to his ineffectiveness claim. We have already affirmed the district court's disposition of one of those claims. See *supra* note 7. The remaining thirteen challenges were dismissed by the district court without elaboration because, in its view, "independent review of these issues reveals them to be meritless."

The panel opinion correctly stated that it is the preferred practice for the district courts to include a brief explanation of its disposition of each individual claim. This practice is not mandatory, however, when the court "reject[s] claims which it regards as frivolous or totally without merit." *Sumner v. Mata*, 449 U.S. 539, 548, 101 S.Ct. 764, 770, 66 L.Ed.2d 722 (1981). The district court found the remaining thirteen grounds to be devoid of merit and our review of those grounds persuades us that the district court could appropriately reject those grounds without elaboration. We therefore affirm the dismissal of the remaining thirteen grounds.

Additionally, the state cross-appealed the district court's refusal to dismiss Washington's petition as untimely and therefore as an abuse of the writ. We affirm the district court's decision. See *Jackson v. Estelle*, 570 F.2d 546, 547 (5th Cir. 1978).

TJOFLAT, Circuit Judge, specially concurring:

This case comes before this en banc court as an appeal from the district court's decision to deny petitioner a writ of habeas corpus. A divided panel of this court voted to vacate in part the district court's decision and to remand the case. I agree with the panel that this case must be remanded, but do so for different reasons.

Petitioner's main contention in support of his application for a writ and the only contention with which this en banc court is concerned, is that he was denied his federal constitutional right, under the sixth and fourteenth amendments to the effective assistance of counsel. In support thereof, petitioner alleges that his counsel incompetently failed to produce certain mitigating evidence at his state capital-sentencing trial. Petitioner also

alleges, as he must to support his claim, that he was prejudiced by his counsel's incompetent omission.

To prevail on his claim, petitioner must sustain both aspects of it: incompetence and prejudice arising therefrom. It is only the latter aspect of his claim with which this opinion is concerned. Because I believe petitioner cannot prevail on the prejudice aspect of his claim, I do not reach the issue whether counsel was incompetent.

My discussion proceeds as follows. First, I discuss the facts and the procedural history of this case. Second, I announce the proper standard for determining prejudice arising from counsel's allegedly incompetent failure to produce mitigating evidence at a state capital-sentencing trial. Third, I discuss the way in which the standard I propose must be applied. And fourth, I described the

errors the district court co-mitted in this case.

Before beginning my discussion, I note the central themes running throughout this opinion. The first theme is the most basic and all the other follow from it—that prejudice must be determined as a matter of state law.¹ Although the ultimate question of ineffectiveness must be decided based on federal constitutional standards, the threshold, and in this case dispositive, question of prejudice is a state law question. The second theme follows directly from the first—federal courts should not interfere in this state law area unless it is absolutely necessary to resolve the claim of ineffectiveness.

1. I note immediately that because the issue of prejudice arising from counsel's failure to produce evidence at a state capital-sentencing trial must be determined within the context of the state's death penalty scheme, my discussion of prejudice in this opinion may pertain only to death sentences imposed under

For this reason, I propose a test for prejudice that minimizes federal court intrusion on state law. The third, and final, theme is that federal courts need not even engage in sensitive determinations of prejudice if state collateral attack courts clearly articulate the state law, in this case states sentencing policy, and if federal courts are aware of their duty to dismiss unexhausted habeas claim. I now begin my discussion.

I.

On September 20, 1976, the petitioner and an accomplice robbed and murdered Daniel Pridgen, a minister; petitioner stated that they killed Pridgen because he believed that a minister who engaged in homosexual activities, as he alleges Pridgen did, is a "hypocrite." On September 23, petitioner broke into the house of

Katrina Birk with an intent to rob. Finding Ms. Birk and her three elderly sister-in-law, and experiencing difficulty during the course of the robbery, petitioner shot and stabbed each victim, killing Ms. Birk and gravely injuring the others. On September 26, petitioner and two accomplice kidnapped Frank Meli. Petitioner killed Meli on September 29, when a ransom demand failed.²

A. The State Proceedings.

On October 1, 1976, petitioner surrendered to police after the apprehension of his accomplices in the Meli case. He confessed and was indicted in the Dade County Circuit Court for that murder and related, lesser offenses on October 7. William Tunkey, the counsel whose effec-

2. For a fuller account of these crimes, see *Washington v. State*, 362 So.2d 658, 660-61 (Fla. 1978).

tiveness at the sentencing phase of petitioner's trial is in question here, was appointed at that time.³

Acting against the advice of counsel, petitioner confessed to the other crimes described above on November 5, 1976, and was indicted for them on November 17. Again acting against the advice of counsel, petitioner pled guilty to all charges in all three cases on December 1, 1976. The circuit judge conducted a thorough and extensive colloquy to ensure the voluntariness of the guilty plea and then accepted it. Petitioner then waived his right to a jury at the sentencing hearing.

At the sentencing hearing, the state opened by detailing the circumstances of the three murders. Tunkey waived an

3. I note that Tunkey's general competence as a lawyer, or the quality of his representation at any point until the sentencing phase of the trial, is not at issue here.

opening statement, relying on a sentencing memorandum filed with the court. The state then called nine witnesses who testified about the aggravated nature of the offenses. It also introduced fifteen exhibits that portrayed the aggravated nature of the crimes.

Tunkey did not introduce any new evidence in mitigation; instead, he adopted petitioner's prior statement at the guilty plea colloquy, thus shielding his client from cross-examination. This previous statement dealt primarily with matters germane to the guilty plea; it also contained some very limited information petitioner volunteered about his dire economic situation, his remorse, and his emotional state. The circuit judge foreclosed the petitioner's attempt to make a more detailed explanation of his actions at the plea hearing, and stated that the court would consider such information at

sentencing. Tunkey, however, declined this explicit invitation to introduce evidence in mitigation at the sentencing hearing.

The state then made a closing argument. Tunkey followed, briefly emphasizing the defendant's honesty in admitting his guilt, stressing the existence of the possibility of life imprisonment without option for parole, and asking the court for mercy. The state then made a brief rebuttal argument.

The court imposed three sentences of death for the three murders.⁴ In imposing these sentences, the court followed the procedures the Florida death penalty statute, Fla.Stat. § 921.141, mandated. First, it arrived at petitioner's sentencing profile. It did this by finding and then weighing statutory aggravating

4. The judge also sentenced Washington to lesser, consecutive terms of impri-

circumstances, id. § 921.141(5), and statutory, id. § 921.141(6), and nonstatutory mitigating circumstances. It then combined these circumstances to arrive at a comprehensive profile of the defendant and his crime.⁵ Second, the court discerned the state's sentencing policy was expressed in sentencing decisions in cases presenting profiles similar to petitioner's. Third, the court applied such policy to petitioner's profile and determined that death was the appropriate sentence in all three cases. The Florida Supreme Court affirmed all three death sentences on

(Footnote 4 continue) sonment for the other offenses involved.

5. Both aggravating and mitigating circumstances fall into two categories: those that aggravate, Fla.Stat. § 921.141(5)(c-i), or mitigate, id. § 921.141(6)(c-e), the offense, and those that aggravate, id. § 921.141(5)(a) & (b), or mitigate, id. § 921.141(6)(a), (b), (f), & (g), the offender.

statutorily-mandated direct appeal.

Washington v. State, 362 So.2d 658 (Fla. 1978), cert. denied, 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979).

On March 19, 1981, petitioner, with different counsel, moved for post-conviction relief in the Dade County Circuit Court pursuant to Fla.R.Crim.P. 3.850.⁶

Since the sentencing judge, Richard Fuller, had retired, Circuit Judge Mario Goderich heard the motion. The core of this collateral attack on the death sentences was that Tunkey's failure to investigate and adduce mitigating evidence at the sentencing hearing denied petitioner his constitutional right to the effective assistance of counsel.

6. An earlier Fla.R.CrimP. 3.850 motion was denied October 2, 1980, without prejudice to refile, due to a lack of verification. Clemency proceedings ensued, but Governor Graham signed petitioner's death warrant on March 13, 1981, setting execution for the week April 6-10. Washington then refiled his rule

Petitioner's motion incorporated all the mitigating evidence that he alleged was incompetently omitted at his sentencing hearing. Although he did not attempt to show that sentencing profiles similar to the one he presented in his motion had received life imprisonment in the past,⁷ he did offer psychiatric evidence of his broken and violent home, one marked by extensive child abuse and incest; his panic, frustration, and depression at his economic circumstances; and his remorse for his crimes. He also offered affidavits

(Footnote 6 continue) 3.850 motion, appropriately verified.

7. Thus, petitioner argued neither that his "new" sentencing profile required a sentence of life imprisonment as a matter of state sentencing policy nor that it did as a matter of federal constitutional law. For a discussion of the crucial difference between the two, see note 21 infra.

from family, friends, former employers, and teachers. These affidavits portrayed a young man under intense emotional pressure because of his inability to provide for himself, his wife, and his infant. They described petitioner as a responsible and nonviolent, active in his church, and devoted to his family. They also emphasized that there was an inexplicable difference between the person the affiants knew and the one who committed these crimes. The affiants stated that they would have testified at the sentencing hearing but were never contacted for that purpose.⁸

After reviewing the record and hearing arguments of counsel, but without holding an evidentiary hearing, the court denied

8. For a more extensive discussion of these affidavits, see *Washington v. Strickland*, 673 F.2d at 888 n.4.

all relief on March 27, 1981.⁹ In so doing, the court assumed *arguendo* that the

9. The state's claim that the Florida state court's rejection of the ineffective assistance claim is entitled to 28 U.S.C. § 2254(d)'s (1976) presumption of validity requires no extensive discussion. Ineffective assistance claims are mixed questions of law and fact, and section 2254(d) is therefore wholly inapplicable. *Baty v. Balkcom*, 661 F.2d 391, 394 n.5 (5th Cir. 1981) cert. denied, ___ U.S. ___, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982); *Harris v. Oliver*, 645 F.2d 327, 330 n.3 (5th Cir.). cert. denied, ___ U.S. ___, 102 S.Ct. 687, 70 L.Ed.2d 650 (1981); *Mason v. Balkcom*, 531 F.2d 717, 721-22 (5th Cir. 1976).

Moreover, the absence of an evidentiary hearing in state court on his claim disposes of the state's contention. The presumption referred to, 28 U.S.C. § 2254(d) (1976), applies only to

determination(s) after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer ... thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia

....

The Florida court disposed of this claim on the pleadings for failure to state a

allegations of petitioner's motion and the affidavits he presented in mitigation were true but held, nonetheless, that he failed to establish a prima facie showing of prejudice arising from ineffective assistance of counsel, which showing is a necessary component of a claim of ineffectiveness.¹⁰ In effect, the court dismissed the motion for failure to state

(Footnote 9 continue) claim on which relief could be granted; therefore, section 2254(d)'s presumption is irrelevant.

10. The state collateral attack court applied the standards the Florida Supreme Court enunciated in *Knight v. State*, 394 So.2d 997 (Fla. 1981), to analyze the prejudice issue. *Knight v. State*, in turn, relied heavily on a plurality opinion of the Court of Appeals for the District of Columbia Circuit. See *United States v. Decoster*, 624 F.2d 916, 208 (D.C.Cir. 1979) (en banc) (opinion of Leventhal, J., for four members of the court). The "outcome determinative" test set forth in *Decoster* may not now command a majority of the Court of Appeals for the District of Columbia Circuit, and it does not command a majority of this court. See not 18 infra. Our determination of prejudice will be

a claim on which relief could be granted.

The court stated that

as a matter of law, the record affirmatively demonstrates beyond any doubt that even if Mr. Tunkey had [presented the new mitigating evidence] at the

(Footnote 10 continue) guided by the standard we articulate today. See Part III *infra*.

I do not mean to criticize, however, the Florida Supreme Court for adopting the outcome-determinative test. As I discuss in Parts II & III *infra*, there are reasons why a federal court should not adopt such a test that do not apply to the state courts. In particular, state collateral attack courts may promulgate state sentencing policy, but federal courts have no power to do so. Because the outcome-determinative test requires federal courts to make provisional state sentencing policy, we must reject it. Nevertheless, the state is free to adopt any test for prejudice it chooses, subject to federal constitutional limitations. No claim is made in this case that the Florida courts may not constitutionally adopt an outcome-determinative test to determine whether a lawyer's failure to introduce mitigating evidence at the sentencing hearing prejudiced his client, and I intimate no opinion thereon.

time of sentencing, there is not even the remotest chance that the outcome would have been any different. The plain fact is that the aggravating circumstances proved in this case were completely overwhelming, and that even to this date the Defendant cannot show that any statutory mitigating circumstances existed. The non-statutory mitigating circumstances existed. The non-statutory mitigating circumstances which he claims his attorney failed to investigate and present at the time of sentencing would as a matter of law, be insufficient to outweigh the multiple aggravating circumstances present in this case.

Order Denying Post-Conviction Relief Filed
Pursuant to Fla.R.Crim.P. 3.850 at 12
(emphasis in original).

On April 6, 1981, the Florida Supreme

Court affirmed this denial of relief, concluding that "[appellant's] claims are shown conclusively to be without merit so as to obviate the need for an evidentiary hearing.... [W]e can find no prejudice caused to appellant, even if we assume that every allegation he has made in his petition is true." *Washington v. State*, 397 So.2d 285, 286 (Fla. 1981).

B. The Federal Habeas Corpus Proceedings.

The same day the Florida Supreme Court handed down its decision, two days prior to his scheduled execution, petitioner applied to the federal district court for a writ of habeas corpus. He presented the same ineffective assistance of counsel claim he had presented in state court. On April 7, the district court conferred with counsel to determine whether an evidentiary hearing would be necessary and thus a temporary stay of execution.

The court inquired whether the Dade County Circuit Court had held an evidentiary hearing on petitioner's claim, and, if so, which issues had been resolved.¹¹ The state replied that the state court had denied petitioner's claims on the pleadings, without an evidentiary hearing, concluding as a matter of law that petitioner had failed to allege a sixth, and fourteenth, amendment violation. Petitioner's counsel insisted that the court had to hold an evidentiary hearing to dispose of each element of petitioner's claim. The stated noted that petitioner's habeas petition, including his allegation of prejudice, merely replicated the Fla. R.Crim.P. 3.850 motion, which the state court had denied on the pleadings. It

11. This is the crucial information required to determine the relevance of 28 U.S.C. § 2254(d) and the need for an evidentiary hearing. See note 9 supra.

urged the court therefore to dismiss the petition without a further hearing, for failure to state a claim on which relief could be granted. The district court concluded this conference with counsel without ruling on the sufficiency of the petition. Shortly thereafter, the court notified counsel that it would convene an evidentiary hearing on April 10.

When the hearing began on April 10, the court announced that it was going to expedite the proceedings. As a starting point,¹² the court stated that it would consider the mitigating evidence that petitioner contended his trial counsel should have produced at the sentencing hearing. The court stated that it would

12. The foundation for the hearing, as in all habeas cases, was the record of the sentencing and collateral attack proceedings in the Dade County Circuit Court, and the two opinions of the Florida Supreme Court reviewing those proceedings, together with copies of petitioner's briefs. See Federal

receive that evidence in the form of the affidavits and psychiatric reports attached to the habeas petition. Record, vol 2, at 4-5. It is worth emphasizing that these affidavits and psychiatric reports were identical to those the state collateral attack court had considered and rejected. The court would not, however, permit the affiants to testify. Petitioner's counsel objected to this procedure and argued that the affidavits were merely illustrative and did not contain everything the affiants and others would say in mitigation of the death penalty if permitted to testify in open court. The court overruled this objection, and instructed counsel to proceed with his case.

Counsel then called petitioner's

(Footnote 12 continue) Habeas Rule 2, 4, and 5.

trial attorney, William Tunkey, to the stand. Tunkey testified that the court had appointed him in October 1976 to represent petitioner against charges that petitioner had kidnapped and murdered Frank Meli. He then testified that after seeing his client's confessions he "had a hopeless feeling," id. at 22, and that "the investigation ..., the work that was done to locate prospective witnesses to testify on his behalf [was] minimal and that is using hindsight." Id at 25-26. Tunkey stated that his knowledge of the sentencing judge, Judge Richard Fuller, dictated his trial strategy for the sentencing hearing. Tunkey believed that Judge Fuller respected a defendant who candidly admitted his guilt. Therefore, Tunkey presented his client's case in a manner that he thought would convince the judge that the defendant had pled guilty to all charges with candor

and sincerity.¹³

Petitioner rested his case after Turkey's testimony, and the state moved for an involuntary dismissal, under Fed.R.Civ.P.

41(b). The court announced that it would defer ruling on the motion until the close of all the evidence and directed the state to proceed with its case.¹⁴ The state's case consisted primarily of the testimony

13. My resolution of the prejudice issue makes it unnecessary for me to decide the question of incompetence. I intimate no opinion thereon.

14. When a district court presented with a sixth amendment claim such as the one in this case elects to rule on a Fed. R.Civ.P. 41(b) motion at the close of the petitioner's case, it must decide: (1) whether petitioner has produced mitigating evidence that would have caused the sentencing court to reconsider its decision, see Part II infra; and (2) whether the evidence indicates that lawyer incompetence—that is, ineffectiveness of constitutional magnitude—was the cause of the omission of this evidence at sentencing rather than, for example, a competent strategic choice. Both issues present mixed questions of law and fact. In answering these questions at the close of

of Judge Fuller. The state presented Judge Fuller as "an expert witness with regard to his experience on the Bench." Record, vol. 2, at 80. Over petitioner's objection on relevancy and other grounds, the state elicited Judge Fuller's opinion that petitioner's new mitigating evidence would have made no difference in the sentence imposed at trial. Judge Fuller stated that the murders petitioner committed were so aggravated that even if petitioner had produced the witnesses identified in his habeas petition at the sentencing hearing and they had testified as petitioner represented they would have, they "would not have changed my opinion then nor would it have changed my sentencing were I to give it today." Id.

(Footnote 14 continue) petitioner's case, the district court of course does not make credibility choices, weigh the evidence, and decide facts; it only determines whether the petitioner has established a prima facie case.

at 96.

The district court denied the writ on the ground that petitioner had failed to prove prejudice arising from Tunkey's failure to produce mitigating evidence at the state sentencing hearing. In its opinion, the court indicated that it did not consider Judge Fuller's testimony as "determinative on the issue of prejudice" because his testimony had "the potential weakness of hindsight analysis"; nevertheless, the court reached the identical result that Judge Fuller said he would have reached. It concluded that "there does not appear to be a likelihood, or even a significant possibility that the balance of aggravating against mitigating circumstances under the Florida death penalty statute would have produced generally favorable information from family, friends, former employers, and

and medical experts." Id.¹⁵

An appeal was taken, and a divided panel of this court vacated in part the district court's decision and remanded the case. *Washington v. Strickland*, 673 F.2d 879 (5th Cir. 1982). The majority held that the district court had applied an erroneous standard to determine prejudice; the dissent argued that

15. The court also summarily rejected fourteen additional alleged deficiencies in the state proceedings and the Florida sentencing statute, noting that although the issues had not been fully briefed, "my independent review of these [claims] reveals them to be meritless." Record, vol. I, at 20. The district court did not explain why these additional claims were meritless; consequently, the panel was unable to carryout its appellate review function. The panel directed the district court, on remand, to address and dispose of each claim separately. *Washington v. Strickland*, 673 F.2d at 907. I concur in the panel's instruction to the district court.

no prejudiced could be shown under any test, and that counsel had made competent, strategic choices. The case is now before us en banc.

II.

I now consider the degree of prejudice a petitioner must prove to obtain federal habeas corpus relief on a claim that his counsel incompetently failed to produce mitigating evidence at his state capital-sentencing trial. My discussion proceeds as follows. First, I note that there is no generally accepted test in this area. Therefore, I treat this case as one of first impression. Second, I reject the test on which the district court relied, the outcome-determinative test, for two reasons: it results in the most onerous federal intrusion on state sentencing policy, and it is incongruous with the goal underlying the right to

counsel-to ensure fairness in the criminal process. Third, I reject the test the panel proposed, whether the mitigating evidence counsel failed to produce would have "altered [petitioner's trial] in a way helpful to [petitioner]," 763 F.2d at 902 because it is too vague. Finally, I propose a test that ensures fairness in the criminal process, and is neither too intrusive on state sentencing policy nor too vague; whether the mitigating evidence counsel failed to produce would have substantially or materially affected the decision-making process of a rational sentencer.

Initially, I note "[t]he law of our circuit is as yet unclear as to the precise degree of prejudice that a defendant must demonstrate before he is entitled to habeas corpus relief on grounds that he received ineffective assistance of counsel" *Washington v. Watkins*,

665 F.2d 1346, 1362 n. 32 (5th Cir. 1981), cert. denied, ___ U.S. ___ 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982) (emphasis in original).¹⁶ It is clear, however, that "some degree of prejudice must be shown." Id. at 1362 (emphasis in original).¹⁷ I now proceed to determine what that degree of prejudice should be in the case before us.

16. Although the Watkins court made that observation, it had no reason to clarify the law because in that case petitioner failed to demonstrate any prejudice whatsoever. 655 F.2d at 1362-63.
17. Accord *Beavers v. Balkcom*, 626 F.2d 114, 116 (5th Cir. 1981); *Mendiola v. Estelle*, 635 F.2d 487, 491 (5th Cir. 1981); *Lovett v. Florida*, 627 F.2d 706, 709-10 (5th Cir. 1980); *Davis v. Alabama*, 596 F.2d 1214, 1221 (5th Cir.), vacated as moot, 446 U.S. 903, 100 S.Ct. 1827, 64 L.Ed.2d 256 (1979), vacated on remand, 623 F.2d 366 (5th Cir. 1980); *Buckelew v. United States*, 575 F.2d 515, 521 (5th Cir. 1978); *United States v. Doran*, 564 F.2d 1176-78 (5th Cir. 1977), cert. denied, 435 U.S. 928, 98 S.Ct. 1498, 55 L.Ed.2d 524 (1978); see *United States v. Morrison*, 449 U.S. 361, 364, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981);

In formulating the proper standard, it is helpful to recognize the deficiencies of the two tests the federal courts have used in this case. The first

(Footnote 17 continue)

The premises of our prior cases is that the constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense. Absent such impact on the criminal proceeding, however, there is no basis for imposing a remedy in that proceeding, which can go forward with full recognition of the defendant's right to counsel and to a fair trial.

But cf. *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978) (when court improperly requires the same attorney to represent two defendants with conflicting interests at same trial, reversal is automatic without a showing of prejudice); *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976) (when trial court prohibits defendant from consulting his attorney during overnight recess separating his direct testimony from his cross-examination, reversal is automatic); *Herring v. New York*, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975) (refusal to permit counsel to make a closing argument is a denial of effective assistance of counsel, and no showing of prejudice is required).

is the outcome-determinative test, which the district court used. The Court of Appeals for the District of Columbia Circuit first formulated the outcome-determinative test in *United States v. Decoster*, 624 F.2d 196 (D.C.Cir. 1979): "[T]he accused must bear the initial burden of demonstrating a likelihood that counsel's inadequacy affected the outcome of the trial." *Id.* at 208 (en banc; plurality opinion; emphasis added.)¹⁸

A majority of the panel in this case rejected the outcome-determinative test because it

would require that the court hearing the ineffective assistance claim put itself in the place of the trial-court factfinder in an attempt to predict

18. It is significant to note that the outcome-determinative test advocated by the plurality in *Decoster v. United State*, 624 F.2d at 208, was developed to assess the effectiveness of counsel in the guilt phase of an armed robbery

with some considerable degree of accuracy what that factfinder would have done had it been presented with difference evidence. We think that a framework of analysis which would inevitably require us, in determining whether the petitioner has made out a prima facie case for habeas relief,

(Footnote 18 continue) trial. This court has found no case, other than the one before us, in which a federal court applied the outcome-determinative test to the sentencing phase of a capital trial. Furthermore, the plurality opinion in *Decoster* may not even be the controlling standard in the District of Columbia Circuit today. See *United States v. Wood*, 628 F.2d 554, 559 (D.C.Cir. 1980) (en banc; per curiam) ("In order to secure a reversal, appellant must establish some basis for believing that a different line of preparation would have resulted in the presentation of a contrary line of testimony for the jury's consideration"). Subsequent panel opinions file to resolve the question precisely. Compare *United States v. Hinton*, 631 F.2d 769, 782 (D.C.Cir. 1980) ("likely prejudice" required) with *United States v. Patterson*, 652, F.2d 1046, 1048 (D.C.Cir.), cert. denied, 454 U.S. 904, 102 S.Ct. 412, 70 L.Ed.2d 223 (1981) (suggesting an "outcome determinative" test might be controlling).

to engage in such highly speculative recreations and revisions of trial court proceedings is to be avoided rather embraced.

Washington v. Strickland, 673 F.2d at 901.¹⁹

An even more important reason for rejecting the outcome-determinative test is its invidious effect on the state sentencing process. As I discuss *supra* Part I, in Florida the decision whether to impose the death penalty involves a three-step process. First, the sentencer finds aggravating and mitigating circumstances, and weighs them to arrive at a sentencing

19. Cf. *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978):

In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable.... But in a case of joint representation of conflicting interests the evil-it bears repeating-is in what the advocate finds himself compelled to refrain

profile.²⁰ Second, the sentencer examines cases presenting profiles similar to petitioner's to find the relevant state sentencing policy. Third, the sentencer applies the state policy to petitioner's sentencing profile, and decides whether the death penalty should be imposed. This process results in a normative determination whether the circumstances of the

(Footnote 19 continue)

from doing... It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client... Thus, an inquiry into a claim or harmless error here would require, unlike most cases, unguided speculation."

Id. 435 U.S. at 490-91, 98 S.Ct. at 1182 (first emphasis in the original, second emphasis added; citations omitted).

20. When I refer to the sentencer I mean the sentencing circuit judge, but I note that he takes into account the recommendation of the advisory jury. Fla.Stat. § 921.141(2).

crime and the characteristics of the defendant warrant a sentence of life imprisonment or of death. This norm, which embraces the given sentencing profile, then becomes a part of the state sentencing policy to which other sentencers must look in the future.

As applied in this context, the outcome-determinative test requires the federal habeas judge to determine whether the omission of certain evidence in petitioner's state sentencing trial substantially affected the outcome of that trial. This determination requires the habeas judge to engage in the three-step process described above, and thus to forecast the appropriate sentence in light of the new evidence. The federal habeas judge must, therefore, promulgate state sentencing policy. Although the state would always be free to reject the federal judge's determination of such policy, the

federal judge still would have entered a provisional sentencing norm. The existence of such provisional sentencing norms could lead to some truly anomalous results, as the following two examples show.

First, poist that a federal habeas judge denies the writ of a petitioner sentenced to death because he concludes that the new evidence would not have affected the outcome of petitioner's sentencing trial. In so doing, the court must have found that the applicable state sentencing policy, which takes into account the new evidence, requires that petitioner receive the death sentence. Now, poist a second case, this one in state court, which presents a sentencing profile identical to the one the petitioner presented in federal court. Clearly, the state is free to reject the federal judge's interpretation of the state sentencing policy and sentence the defendant to life

imprisonment. If, however, the state court imposes such a sentence, the unbelievable result is that a federal court has upheld a death sentence on the basis of a provisional norm which the state later rejects as an erroneous forecast of state sentencing policy. This court must not adopt a test that might produce such a result.

A second example further shows the anomalous results of using an outcome-determinative test. Posit a federal habeas judge who grants the writ of a petitioner sentenced to death because the new evidence requires the application of state sentencing policy that calls for a sentence of life imprisonment. Now, posit that a resentencing trial occurs in state court. There, the state court considers the identical sentencing profile that the habeas judge considered. As in the first example, the state sentencer is free

to reject the federal court's promulgation of a temporary state sentencing norm and to sentence petitioner to death. If the state sentencer does impose the death penalty, the federal court's provisional decision may create needless confusion, and a perception of injustice arising from the conflicting decisions of two courts.

Because the outcome-determinative test could produce these inconsistent results, it must be rejected. This court cannot countenance any test for prejudice that requires the federal court to intrude so deeply into the promulgation of state sentencing norms, an area in which the state courts have the primary authority.²¹

21. I must emphasize that although state courts are the primary promulgators of state sentencing policy, they are, of course, subject to the Federal Constitution. Federal courts are, of course, the ultimate interpreters of that venerable document. Therefore, if a claim is made that a state sentencing decision is

The result of allowing the federal judiciary to intrude on such an area is that the federal courts must make provisional forecasts of state sentencing norms. As

(Footnote 21 continue) unconstitutional, because, for example, it is arbitrarily disparate with other sentences, the federal court must decide that claim. Petitioner raises no such claim in this case, and I intimate no opinion thereon.

In this case, petitioner claims only that he was prejudiced as a matter of state law because he may have received a life sentence had his counsel produced the omitted mitigating evidence at his sentencing hearing. Although petitioner's incompetency claim is based on the sixth and fourteenth amendments to the Federal Constitution, he attempts to show prejudice only as a matter of state law. Because we are dealing with a claim one aspect of which, incompetency, is based on federal law, and the other aspect, prejudice, on state law, unfortunately we may have to concern ourselves with state sentencing policy somewhat. Aside from this intrusion, which, as I discuss in Part III infra, is within the state's power to prevent, we as federal courts have no business involving ourselves with state sentencing policy unless, of course, a constitutional claim arises.

the above examples illustrate, such provisional decision making must be avoided.²²

The outcome-determinative test must also be rejected because it is incongruous with the rationale underlying the right to counsel. The Supreme Court recently stated this rationale in *United State v. Morrison*, 449 U.S. 361, 101 S.Ct. 665, 66 L.Ed. 2d 564 (1981): "The Sixth Amendment provides that an accused shall enjoy the right 'to have the assistance of counsel for his defense.' This right, fundamental to our system of justice is meant to assure fairness in the adversary criminal process."

22. The use of the outcome-determinative test creates a situation analogous to the situation the Supreme Court sought to avoid by fashioning the abstention doctrine in *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct., 643, 85 L.Ed. 971 (1941):

In this [case] a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication.... The reign of law

Id. at 363, 101 S.Ct. at 667. The Supreme Court has thus intimated that the test for determining prejudice arising from the ineffective assistance of counsel should focus on whether the fairness of the "adversary criminal process" was affected. Thus, we should not adopt a test that measures prejudice by looking to the outcome of the criminal proceeding, as opposed to the fairness of the proceeding itself, because such a test focuses on the wrong issue and therefore is not suited to achieving the underlying goal of the right to counsel. For the reasons

(Footnote 22 continue)

is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision....

312 U.S. at 500, 61 S.Ct. at 645 (citations omitted).

described above, we must reject the outcome determinative test as the standard for determining prejudice in federal habeas proceedings.

In rejecting the outcome-determinative test, the panel suggested an alternative: "this prejudice requirement is satisfied by demonstrating that but for his counsel's ineffectiveness his trial, but not necessarily its outcome, would have been altered in a way helpful to him....

[T]he change [in the trial] must be something more than insubstantial or de minimus. See *Washington v. Watkins*, 655 F.2d at 1362, n. 32...." 673 F.2d at 902.

This standard is however, also problematic. It is vague in the extreme and, therefore, of little utility. It simply provides no standard at all to guide courts in assessing prejudice. Any additional evidence would alter a trial somewhat; what constitutes more than insubstantial or de minimus

alteration is obscure. Therefore, this test too must be rejected.

Having described the shortcomings of the tests proposed thus far, it is clear that the proper standard for determining prejudice must satisfy the following concerns: it must provide the courts with some definitive guidance to assess prejudice; it must be responsive to the goal of ensuring "fairness in the adversary criminal process"; and it must not require the federal courts to engage in provisional decision making. I believe the following test satisfies these concerns: to show prejudice in a case like the one before us petitioner must prove that the decision-making process of a rational sentencer would have been substantially or materially altered had counsel properly produced the omitted mitigating

evidence.²³ If the district court determines that the new evidence would not have made a substantial difference on the decision-making process of the state sentencer, the prejudice test is not satisfied.

23. The petitioner must carry his burden of proof by a preponderance of the evidence. See Walker v. Johnston, 312 U.S. 275, 286, 61 S.Ct. 574, 579, 85 L.Ed. 830 (1941) (a habeas case in which the Supreme Court required petitioner to bear "the burden of sustaining his allegations by the preponderance of the evidence"). This traditional civil burden of proof and its allocation are used because habeas corpus proceedings are civil proceedings. See Browder v. Director, Department of Corrections, 434 U.S. 257, 269, 98 S.Ct. 556, 563, 54 L.Ed.2d 521 (1978) ("It is well settled that habeas corpus is a civil proceeding").

Judge Vance disagrees with this traditional burden and its allocation as applied in this case. He would change the model in habeas corpus cases based on an ineffective assistance of counsel claim to the following: the petitioner bears the burden of proving by a preponderance of the evidence that the ineffective assistance of counsel worked to his actual and substantial disadvantage. If petitioner satisfies this initial burden, then

This test provides the federal courts with definitive guidance because it requires them not merely to determine

(Footnote 23 continue) the burden of proof shifts to the state who must prove that counsel's ineffectiveness was harmless beyond a reasonable doubt.

I reject Judge Vance's proposed burden and its allocation for several reasons. First, Judge Vance's proposal clearly flies in the face of the traditional standards of proof used in civil proceedings. In addition, Judge Vance's proposed burden and its allocation are totally inconsistent-if either the petitioner or the state satisfies their respective burdens, then the other party cannot, as a matter of law, satisfy its burden. For example, if at the conclusion of the habeas proceeding, the petitioner has carried his burden of proving prejudice (i.e., that the ineffective assistance of counsel worked to his actual and substantial disadvantage), then it is logically impossible also to find that this prejudice was harmless beyond a reasonable doubt, then it cannot also find that petitioner proved his prejudice by a preponderance of the evidence.

I also reject Judge Vance's proposed allocation of the burden of proof for strong policy reasons. Generally, the burden of proof is allocated to that party who has control of the evidence required to prove the claim raised in the action. In an action based on a claim of ineffective

whether the trial process was "affected," but whether it was "substantially affected." Although such terms as "substantial" and "material" still do not attain the

(Footnote 23 continue) assistance of counsel due to a failure to produce evidence, this mitigating evidence is peculiarly within the control of the petitioner. Therefore, it is appropriate in such cases to allocate the burden of proof to the petitioner.

Finally, I note that Judge Vance's reliance on *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), to shift the allocation of the burden of proof is misplaced. *Chapman* arose from a direct appeal of a decision by the California Supreme Court. This case arises from a collateral attack of a sentence of death by a state trial court. The different proceedings require different burdens as well as different allocations of proof. See *United States v. Prady*, U.S., , 102 S.Ct. 1584, 1593, 71 L.Ed.2d 816 (1982) (differences between collateral attack and direct review require differing standards of review); cf. *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736-37, 52 L.Ed.2d 203 (1977) (burden of proving that an erroneous instruction was prejudicial greater on collateral attack than on direct review). Thus Judge Vance is wrong when he suggests that federal district courts in their trial of habeas corpus cases should use the standards the Supreme Court uses in his appellate review.

III.

Having articulated the proper standard for determining prejudice, I now explain how a federal habeas court must apply it. The overriding message of this explanation is that because prejudice must be determined as a matter of state law, the court must first identify the relevant state sentencing profiles and norms applicable to petitioner's case. Furthermore, once it is understood that a court can determine prejudice only by discerning state sentencing policy, it becomes clear that if state courts clearly articulate such policy and if federal courts are sensitive to dismissing unexhausted petitions, no room is left for federal courts to interfere with such policy. In fact, the prejudice test I propose need be applied only when the state collateral attack court has failed to articulate clearly the state sentencing policy applicable to the sentencing

level of guidance desired, they are terms which court apply daily in testing abstract concepts. Moreover, these terms become more meaningful when applied in light of the underlying goal of ensuring fairness in the criminal process. As such, this test provides the federal courts with as much guidance in assessing prejudice as is possible in this area. This test also properly focuses on the trial process, rather than on its outcome. Therefore, it is responsive to the goal of ensuring a fair criminal process, the underlying purpose of the right to counsel. Finally, because this test does not require the court to concern itself with the outcome of a hypothetical case, the court need not engage in provisional decision making. In sum, the test remedies the shortcomings of the tests previously discussed.

profile petitioner has presented to the federal court. Thus, a major concern the state has expressed in this case, that of federal court intrusion on state sentencing policy, is addressed. I now discuss these points in greater detail.

I begin my analysis by observing that the question of prejudice from counsel's failure to produce mitigating evidence is a question of determining the effect the omitted evidence would have had on the original sentencer. Of course, no collateral attack court can say with certainty what this effect would have been. It simply cannot read the mind of a hypothetical sentencer in a hypothetical case. The best the court can do is look to those considerations the sentencer would have looked to had it been presented with the omitted evidence. By examining the same considerations the sentencer would have examined, the court is able to make a

rough judgment how the new evidence would have affected the sentencer.

As I discuss in Parts I and II *supra*, in Florida the decision whether to impose the death penalty involves a three-step process. First, the sentencer considers all the relevant evidence presented concerning the offense and the offender. The sentencer evaluates this evidence and arrives at a sentencing profile.²⁴ Second, the sentencer looks for other sentencing decisions presenting sentencing profiles similar to the one before it. From these decisions, it gleans the state sentencing norms promulgated in those cases. Third, having determined both the sentencing profile in the

24. As I discuss *supra* in Part I, in making its findings of fact and conclusions of law the sentencer classifies the offense and the offender in terms of the statutory aggravating and the statutory and nonstatutory mitigating circumstances. It then

case before it and the relevant policy as expressed in norms, the sentencer applies the policy to the profile and arrives at its decision. This decision involves the sentencer's judgment about how clearly state policy addresses defendant's case. If state policy is clear, the sentencer has less discretion within which to impose its sentence. If state policy is unclear, however, because the sentencing profile before it is materially different from those presented to state sentencers in previous cases, the sentencer has more discretion within which to make its sentencing decision. In making its decision, the sentencer promulgates a new sentencing norm which becomes part of state sentencing policy.

(Footnote 24 continue) combines these characteristics into a sentencing profile that presents a comprehensive picture of all aspects relevant to the sentence.

I discuss in more detail in this Part *infra*, if petitioner has presented his new profile to the state collateral attack court, therefore exhausting his claim, the federal court should have to look no further than the state collateral attack court's dispositive order to find the norm governing petitioner's case. Thus, if that state court has articulated this norm clearly, the federal court's task in engaging in the third step becomes simple.

At the third step the similarity between the role of the sentencer and that of the federal court ends. The federal court has no role in determining whether existing state sentencing policy dictates the outcome in a petitioner's case. This is a state policy determination and, as I discuss in Part II *supra* in rejecting the outcome-determinative test, an area into which federal courts must not intrude.

Once the above description of the sentencing process is understood clearly, the task of federal courts in deciding the issue of prejudice in connection with claims of ineffective assistance of counsel based on counsel's failure to produce evidence becomes simple. The federal court must go through the first two steps just as the original sentencer would have done. First, it identifies the sentencing profile petitioner claims he would have presented to the sentencing court had his counsel not been incompetent. It does this by starting with the profile the sentencer described when it imposed sentence, and then altering that profile to account for the omitted evidence.

Having identified the profile, the court next engages in the second step-finding those profiles similar to petitioner's in order to find what sentencing norms were applied to those profiles. As

Rather, under the test I propose, the federal court's role is to determine only whether state sentencing policy is clear enough that the sentencer would have had not substantial discretion to impose a sentence of life imprisonment. If the state police leaves the sentencer with substantial discretion to impose either a sentence of death or life imprisonment, the federal court must find that prejudice exists. In practical terms, this is what I mean when I say that prejudice exists when the new evidence would have materially altered the decision-making process of a rational sentencer.

Having described the way in which the federal court applies the test for prejudice in terms of three concrete steps, my next observations is that if the state courts clearly articulate state sentencing policy and if federal courts are sensitive to dismissing unexhausted habeas petitions,

the federal court's performance of the third step is simple. In approaching the third step, one of three things should become obvious to the federal habeas judge: he must dismiss petitioner's claim because state policy, as promulgated by the state collateral attack court, is clear that death is the appropriate sentence; he must proceed to make the determination dictated by the third step because the state collateral attack court has not clearly articulated state sentencing policy; or he must dismiss the petition because petitioner has presented an unexhausted claim. Only in the second scenario is the federal habeas court forced to apply the prejudice test I propose and thus engage in the potentially difficult canvass of state sentencing policy the test dictates. The occurrence of this scenario is, however, within the state's power to prevent. This becomes

apparent when one realizes the function of the state collateral attack court in resolving the issue of prejudice. I review this function briefly before returning to a discussion of these three scenarios.

In deciding a claim of attorney incompetence based on counsel's failure to produce evidence, the state collateral attack court must also engage in a three-step process to determine whether the petitioner was prejudiced. The first two steps are identical to those performed by the state sentencer and the federal habeas judge: the court must find the offense and offender characteristics and describe the new sentencing profile the petitioner presents and it must identify the sentencing norms promulgated in similar cases. The crucial distinction for our purposes between a state collateral attack court and a federal collateral

attack court becomes apparent at the third step. At this stage, the state collateral attack court acts like the original state sentencer in the sense that it promulgates state sentencing policy by discerning the norm in the case before it. This norm becomes part of the state sentencing policy the federal court must look to in engaging in its third step.²⁵

25. I note that the state collateral attack court promulgates state sentencing policy no matter what test for prejudice it uses in engaging in the third step. For example, if the state court uses an outcome-determinative test, and finds no prejudice, it determines that state policy is such that the new evidence would not have affected the outcome of the sentencer's decision. Therefore, state policy dictates the death sentence. If the state court uses a test such as the one I propose, and finds no prejudice, it determines that state policy is such that the new evidence would not even have materially affected the decision-making process of a rational sentencer. Again, state policy dictates the death sentence. In either case, the state collateral attack

Once it is understood that state collateral attack courts play a crucial role in promulgating state sentencing policy, it becomes clear that the federal court should have to look no further than the state collateral attack court's promulgation of state policy to find the norm controlling petitioner's case. Therefore, the federal court need not engage in the sensitive canvass of state policy the third step might otherwise have called for. The simplest way to demonstrate this point is to consider the three ways in which a claim such as the one petitioner here presents can come to federal court.

(Footnote 25 continue) court has clearly articulated state sentence policy, and that is all the federal court is looking for. Therefore, it make no difference to the federal court for purposes of determining state policy which prejudice test the state court uses. As I discuss at note 10 supra, no constitutional attack is made on the state's test for prejudice and I intimate no opinion thereon.

The first possible scenario is that the petitioner, in alleging prejudice, presents the same sentencing profile to the federal court as he did to the state collateral attack court has clearly articulated state sentencing policy in determining that petitioner had failed to prove prejudice. In making that determination, the state collateral attack court decided that the death penalty is required in a case presenting

(Footnote 25 continue) I note parenthetically one possible scenario, however, in which the state court's test for prejudice may affect the third step of the federal court's process. This situation would occur when the state court finds prejudice under a test more nebulous than the federal test, such as the panel's "altering the trial" standard, but finds no ineffectiveness. Thus, the state court would deny the claim. Again, assuming the federal test for prejudice is clearer than the state court's test, the state court's promulgation of state policy might be unclear to the federal court. If the federal court is true to its test, it must question the state court's finding of prejudice, and this involves a sensitive canvass of state sentencing policy. I note that this problem does not arise strictly

the petitioner's new sentence profile. This interpretation of state sentencing policy is binding on the federal court. Consequently, the petitioner cannot possibly sustain his allegation of prejudice in federal court. The federal court must deny the claim because it has identified the state sentencing policy that directly controls petitioner's case and this policy dictates the penalty of death. As I discuss in Part IV *infra*, this scenario occurred in this case, but the district court failed to realize that its decision was dictated by clear state policy.

(Footnote 25 continue) from the state court test itself, but rather from the possible unclear articulation of state policy resulting from the state court's use of the test. I raise this scenario parenthetically, but I note that it involves the unlikely confluence of three factors: a state court finding of prejudice, a state court finding of no ineffectiveness, and a state test for prejudice more nebulous than the federal test.

The second possible scenario occurs when the federal court is presented with the identical sentencing profile presented to the state collateral attack court, and the state court has denied petitioner's claim without clearly articulating state sentencing policy. For example, the state court may have denied petitioner's claim without giving reasons therefor.²⁶ Thus, the federal court would be unable to discern whether the petitioner failed to prove prejudice or incompetence or both. Because it could not tell whether petitioner proved prejudice, it would have to engage in its own determination of prejudice without the benefit of a clearly controlling state norm. Obviously, this determination should be avoided if possible. Fortunately, it can be avoided

26. See also the situation discussed in the second paragraph of note 25 *supra*.

easily enough if state collateral attack courts carefully and clearly articulate sentencing policy in their decisions. This second scenario is, therefore, within the state collateral attack court's power to prevent.

The final scenario occurs when the petitioner comes to federal court with a sentencing profile materially different from that present to the state collateral attack court.²⁷ The state collateral attack court has therefore not been given the opportunity to apply state sentencing policy to the profile petitioner presents to the federal court. Because the state

27. I note that a fourth possible scenario exists. The petitioner, in alleging prejudice, presents the same sentencing profile to the federal court as he did to the state collateral attack court, which held that petitioner proved prejudice but did not prove ineffective assistance of counsel. I do not discuss this scenario in the text because it is identical to the first scenario in that the state collateral attack court's finding of prejudice is binding

has not been given this opportunity, the federal court must dismiss the claim for want of exhaustion. Thus, if the federal court is sensitive to dismissing unexhausted claims, this third scenario can be avoided.²⁸

In sum, I have described how the state sentencing court, the state collateral attack court, and the federal habeas court all engage in a three-step inquiry, to impose sentence in the case of the first court, and to determine prejudice in the case of the latter two courts. Although the first two steps are the same for all three counts, the third step varies among them. It is this crucial third step which may present difficulty for federal courts.

(Footnote 27 continue) on the federal court. The federal court need concern itself only with the incompetency aspect of the claim.

28. I note that the state, as party to the habeas petition, can do its part by rising petitioner's failure to ex-

This difficulty can be, however, avoided. Federal courts can dismiss unexhausted claims. State collateral attack courts can do their part by clearly articulating state sentencing policy.²⁹ Through this cooperative effort among federal and state

(Footnote 28 continue) haust his claim to the federal court.

29. State sentencing courts can also to their part by ensuring that all revelant sentencing evidence is before them before they impose sentence. The state sentencing court can ensure this by performing two simple tasks. First, after receiving the advisory jury's recommended sentence but before convening the parties for sentencing, it can request a presentence investigation report. This will enable the court to impose sentence with considerable knowledge of the crime and the defendant's background. Second, the sentencing court, prior to imposing sentence, cas ask both the defendant and his counsel whether any investigation of the defendant's background remains to be done, and whether there is additional relevant information in mitigation of the death penalty that might be presented to the court.

This discussion is not meant to suggest, however, that the sentencing court bears the primary responsibility for ensuring that all relevant sentencing

courts much needless and detrimental litigations can be avoided.

I now turn to the errors the district court committed in this case.

IV.

In addition to applying the wrong test for prejudice, the outcome-determinative test, the district court committed three fundamental errors, each of which alone constituted reversible error. Before examining these errors, I note that each error arose from the court's failure to apply the three-step process I have described in Part III *supra*. To reiterate,

(Footnote 29 continue) evidence is before it prior to imposing sentence. In an adversary sentencing hearing, this responsibility remains with defense counsel who should look for guidance to the American Bar Association Standards for Criminal Justice. More specifically, defense counsel should consider American Bar Association Standard for Criminal Justice 18-6.3 (f)(ii) (2d ed. 1980), which provides that counsel

should take particular care to make certain that the record of the sentencing

first the district court should have identified petitioner's sentencing profile. Second, it should have discerned the relevant state sentencing policy. Third, it should have determined whether state policy was such that the sentencer would have had substantial discretion to impose life sentence. Had the district court engaged in this process, it most likely would not have committed the errors described below.

The first ruling in which it was essential that the district court engage in the above process, but failed to do so, was its ruling, implicit in the scheduling of an evidentiary hearing, that the petitioner stated a claim of prejudice

(Footnote 29 continue)

proceedings will accurately reflect all relevant mitigating circumstances relating either to the offense or to the characteristics of the defendant which were not disclosed during the guilt phase of the case and to ensure that such record will be adequately preserved

arising from counsel's alleged incompetence.³⁰ Had the court engaged in the three-step process described above, it

30. In a typical federal habeas corpus proceeding, a state prisoner begins the procedure by filing a petition pursuant to Federal Habeas Rules 2 and 3. The district court must examine this petition and any attached exhibits to determine whether it states a claim for relief. Federal Habeas Rule 4. If the facts as pled do not state a claim for relief, the court must sua sponte dismiss the petition. *Id.*; 28 U.S.C. § 2243 (1976). If the facts as pled do not state a claim for relief, the court should then examine whether dismissal is appropriate on procedural grounds, i.e., failure to exhaust state remedies, a decision pending in state court, petitioner not in custody within meaning of 28 U.S.C. § 2254 (1975), etc. If dismissal is appropriate on procedural grounds, the court must request the state to move for dismissal on such grounds. See Advisory Committee Note to Federal Habeas Rule 4.

If the facts as pled do state a claim for relief and dismissal is not appropriate on procedural grounds, the court must order the state to file an answer. Federal Habeas Rule 5. In its answer, the state must rebut petitioner's allegations, indicate whether state remedies have been exhausted, and append relevant portions of the transcripts of the state proceedings. *Id.*

would have realized that petitioner alleged the same sentencing profile that the state collateral attack court had held warranted the death penalty. As I discuss supra Part I, the state collateral attack court stated that

(Footnote 30 continue) With the petition, answer, and supporting documents before it, the district court must redetermine whether a claim for relief is stated. If the court now determines that a claim for relief is not stated, it must sua sponte dismiss the petition. If the court determines, pursuant to 28 U.S.C. § 2254(d), which factual issues, if any, raised by the petition require an evidentiary hearing. Therefore, when a district court orders an evidentiary hearing in a habeas case, it implicitly holds that from its examination of the pleadings and exhibits before it, petitioner has stated a claim for relief and only factual issues need be resolved.

The district court did not adhere to this procedure in the instant case because of time constraints. As I discuss in Part I supra, petitioner filed his habeas petition in the district court on April 6, 1981, just two days prior to his scheduled execution. The district court, therefore, was unable initially to examine the petition to determine (1) if it stated a claim for relief, (2) if it should be dismissed on procedural grounds, (3) if the state should file an answer, and (4) if an evi-

as a matter of law, the record affirmatively demonstrates beyond any doubt that even if Mr. Tunkey had [presented the new mitigating evidence] at the time of the sentencing, there is not even the remotest chance that the outcome would have been any different. The plain fact is that the aggravating circumstances proved in this case were completely overwhelming, and that even to this date the Defendant cannot show

(Footnote 30 continue) dentiary hearing should be held. Instead, the court had to combine these functions in an expedited conference of counsel held on April 7, 1981. There, counsel argued whether the petition stated a claim for relief and whether an evidentiary hearing was required. Based on these arguments and the state court record subsequently supplied to the district court, the district court ordered an evidentiary hearing for April 10, 1981. In ordering this hearing, the district court implicitly held that the petition stated a claim for relief and only factual issues remained to be resolved. The district court later made this holding explicit when it stated: "It is a close question, but I was unable to find from the records before me priot to the hearing that petitioner's allegations raised legal

than any statutory mitigating circumstances existed. The non-statutory mitigating circumstances which he claims his attorney filed to investigate and present at the time of sentencing would as a matter of law, be insufficient to outweigh the multiple aggravating circumstances present in this case.

Order Denying Post-Conviction Relief Filed Pursuant to Fla.R.Crim.P. 3.850 at 12 (emphasis in original). The Florida Supreme Court affirmed this denial of relief, concluding that "[appellant's] claims are shown conclusively to be without merit so as to obviate the need for an evidentiary hearing.... [W]e can find no prejudice caused to appellant, even if we

(Footnote 30 continue) questions only, or that assuming all factual allegations were true, that petitioner could not have prevailed as a matter of law." Record, vol. 1, at 52.

assume that every allegation he has made in his petition is true." Washington v. State, 397 So.2d 285, 286 (Fla. 1981).

Because the state collateral attack court's normative decision, as affirmed by the Florida Supreme Court, that death was the appropriate sentence for petitioner based on his sentencing profile, is binding on federal courts, the district court should have held that petitioner could not possibly sustain his claim of prejudice. The norm as promulgated by the state collateral attack court governed petitioner alleged sentencing profile and dictated a sentence of death. The district court should have, therefore, dismissed the petitioner for failure to state a claim for relief.³¹ Its holding of an evidentiary hearing was its first error.

31. If petitioner had modified his petition by reciting "new" sentencing facts that materially changed the sentencing profile he had presented to the state

Having improperly determined that an evidentiary hearing was necessary, the court committed its second error during the hearing when it prevented petitioner from introducing all of his evidence on prejudice. Instead, the court relied only on the affidavits and psychiatric reports petitioner provided in support of the petition. As I noted in Part I, *supra*, the petitioner's counsel objected to this procedure and argued that the affidavits were merely illustrative and that he would call additional witnesses to testify on mitigation. Petitioner thus needed to introduce all of his evidence to establish his sentencing profile, from which he would then argue prejudice. Without

(Footnote 31 continue) collateral attack court, or if he had recited in his petition other relevant sentencing norms not recited to the state courts that allegedly demonstrated that his sentence was disparate, the state would no doubt have moved to dismiss his petition for want of exhaustion and the district court would have been compelled to dismiss on that ground. See the discussion of the third scenario in Part III *supra*.

engaging in the first step, determining petitioner's sentencing profile, the court's search for the relevant sentencing policy from which it could evaluate the petitioner's claim of prejudice, was impossible. Because the court did not understand the three-step process and thus the importance of the evidence petitioner sought to introduce to the proper resolution of the first step, it excluded the evidence. In so doing, the court ruled on the issue of prejudice by looking at an incomplete sentencing profile presumably different from that which petitioner alleged competent counsel would have established at his state sentencing trial. This clearly was error; the court should have provided petitioner the opportunity to establish his alleged sentencing profile.³²

32. Alternatively, the court could have instructed counsel to proffer his

The court committed its third error when it allowed the original state sentencing judge, Judge Fuller, to testify at the hearing on the issue of prejudice. The inadmissibility of Judge Fuller's testimony is obvious when one considers the three-step process described above. Each step of the process involves questions the federal habeas court is competent to decide independently. A federal habeas court can hear evidence and find the sentencing profile petitioner alleges his counsel should have presented to the state sentencer. It can examine the findings of fact and conclusions of law of sentencers, see Fla.Stat. § 921.141(3), and collateral attack courts, and the decisions of the Florida Supreme Court, to identify the relevant sentencing policy.

(Footnote 32 continue) mitigating evidence but did not do so. With a proffer in the record, the court could have engaged in the first step I have described above and found the petitioner's new sentencing profile.

Finally, it can compare this policy with petitioner's profile and determine whether the new evidence would have materially altered the decision-making process of the sentencer.

I can see no reason why Judge Fuller's testimony would be admissible in the district court on any of these issues. The first two questions are factual, and the district court can find these facts from the record evidence the parties adduce without the assistance of an expert witness. The third question is one of mixed law and fact, and the district court is capable also of making this determination. Judge Fuller's "expert" testimony would be admissible only if the decision maker, here, the federal habeas court, it untrained or unqualified to determine the issues presented to it. See Fed.R.Evid. 702. Obviously, the federal habeas court is trained in the law and qualified to make

the decisions required to determine prejudice. Because Judge Fuller's opinion testimony was unnecessary, I hold that it was inadmissible under Federal Rule of Evidence 702.

V.

In light of the error described above, I would remand this case to the district court for proceedings not inconsistent with this opinion. Specifically, if the district court determines that petitioner presents the same sentencing profile to it as it did to the state collateral attack court, it must deny petitioner's claim of ineffective assistance of counsel. If, on the other hand, it determines that petitioner advances a sentencing profile materially different from that which he presented to the state collateral attack court, it must dismiss the petition for want of exhaustion.

CLARK, Circuit Judge, concurring:

I concur in Judge Tjoflat's opinion except for the remand instructions. I would ask the district court to conditionally grant the writ subject to the state court holding an evidentiary hearing to permit introduction of Washington's mitigating circumstances evidence. The state court should determine, not a federal court, whether such evidence tilts the scales to a life sentence. The only problem with this case is that no Florida court has heard and considered the evidence. The affidavits were not a substitute for evidence and were filed for the purpose of securing a hearing. A hearing by a Florida court would bring this case to a speedy conclusion.

JOHNSON, Circuit Judge, concurring in part and dissenting in part:

This Court today holds that a habeas petitioner must show that his counsel's ineffectiveness causes "actual and substantial disadvantage" to the conduct of his defense. If the petitioner meets this burden, the state may rebut by showing "in the context of all the evidence that it remains certain beyond a reasonable doubt that the outcome of the proceedings would not have been altered but for the ineffectiveness of counsel."

Slip op. at 15862, ___ F.2d at ___ (emphasis in original). Rather than discussing the application of this standard to the facts of the case before us, Judge Vance would simply remand the case to the district court, citing *Pullman-Standard v. Swint*, ___ U.S. ___, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982). I concur with Parts I, IIA, and IIIA-C of Judge Vance's opinion, particularly in its discussion of the standard for determining effective-

ness of counsel and the degree of prejudice required. I also conclude, as Judge Vance does, that this case should be remanded to the district court's findings in this case do not permit us to reach a conclusion as to whether counsel was effective. I also dissent from Part IIID, which holds that a remand is necessary to determine whether the petitioner sustained his burden of showing prejudice. I conclude that the district court's findings of fact clearly support the conclusion that counsel was ineffective. In addition, the district court's findings required the conclusion that counsel's ineffectiveness "caused actual and substantial disadvantage to the conduct of [the petitioner's] defense." Slip op. at 15847, ___F.2d at ___. Thus, I would not remand for further hearings on either of these issues. I would, however, remand this case to the district

court to permit the state to attempt to rebut the petitioner's showing of prejudice.

The district court found the following facts. According to the uncontradicted testimony of Mr. Tunkey, Washington's lawyer at the sentencing hearing, Tunkey "made no active effort to bring in witnesses to testify on petitioner's behalf regarding his childhood, family ties, or financial problems."¹ After Washington's wife and mother "failed to show" for an appointment with Tunkey (the court did not make clear who had arranged the meeting), Tunkey "did not seek them out."² The district court found that "it was evident that Mr. Tunkey should have made an independent investigation of factors relevant

1. Order of District Court Denying Petition for Writ of Habeas Corpus and Continuing State for 48 Hours at 6 [hereinafter "order"].

2. Order at 7.

to mitigation, and that such investigation would have produced generally favorable information from family, friends, former employers, and medical experts."³ The court found further that this failure to investigation constituted an "error in judgment."⁴

3. Order at 15.

4. In the same sentence the court concluded that such error did not constitute ineffective assistance of counsel. As the court itself noted, however, see order at 17, the court's application of law to facts is itself a conclusion of law. Thus, unlike its finding of fact (which the Court can overturn only if clearly erroneous), the district court's conclusions of law may be independently reviewed. This Circuit has followed this practice in cases involving claims of ineffective assistance of counsel, see, e.g., *Baty v. Blakcom*, 661 F.2d 391, 394 n. 7 (5th Cir. Unit B 1981) ("historical," or "pure," facts judged by clear error standard or review; appellate court applied own judgment, however, to ultimate determination of mixed question of fact and law as to whether counsel was effective); a practice which the Supreme Court explicitly approved in *Pullman-Standard v. Swint*, U.S., 102 S.Ct. 1781, 1788 n. 16, 72 L.Ed.2d 66 (1982).

The district court also recited testimony from Tunkey to the effect that Tunkey "couldn't say that [his failure to request a presentence investigation] was a trial strategy."⁵ The court found that Tunkey testified that "he felt [the investigation] would possibly be more detrimental than helpful,"⁶ but the district judge below clearly rejected this fear as unfounded: "it is evident from Mr. Tunkey's testimony," the judge wrote, "that he was concerned that such a report could also prove detrimental. Nonetheless, in light of the generally supportive affidavits

(Footnote 4 continue) Pullman-Standard did not alter the standard of review in cases involving questions of mixed fact and law; it held only a finding of intent to discriminate under Title VII is a pure fact and is thus subject to the clear error standard of review.

5. Order at 7.

6. Id.

filed in this case [from family members, neighbors, and friends], it is evident the report may have provided additional independent information in mitigation of the aggravating circumstances previously shown.⁷ In fact, the real reason found by the court for Tunkey's failure to investigate had nothing to do with strategic reasoning or evaluation of the information that might have been obtained in an investigation. Instead, the court found that Tunkey simply gave up:

It is evident that in the instant case, Mr. Tunkey's judgment was affected by the evidence of Washington's guilt and his desire to plead guilty. Mr. Tunkey candidly admitted that once multiple confessions were given, he had a feeling that nothing could be done to save Washington and that this feeling

7. Order at 14 (emphasis added).

was behind his failure to do an independent investigation into petitioner's background and potentially mitigating emotional and mental reasons for the killings.⁸

The court earlier characterized Tunkey's feeling as one of "hopelessness."⁹ Thus, the court plainly accepted Tunkey's uncontradicted testimony that his failure, among other things, to request a presentence investigation report was not strategy.

Tunkey did pursue a strategy of "attempt[ing] to convince the [sentencing] judge of Washington's sincerity and frankness in pleading guilty" on the ground that the judge might consider such a fact favorably in his sentencing decision.¹⁰ But the

8. Order at 15.

9. Order at 6.

10. Order at 7.

defense strategy clearly was not to pursue this course at the expense of others. The district court noted that the sentencing judge also had before him evidence as to Washington's background and possible mental and emotional reasons for the killings; Washington apparently had made statements to this effect during the plea colloquy.

Finally, in a subsequent Order Denying Motion for Rehearing or New Trial [herein after "retrial order"], the same district court judge found that an April 1981 psychiatrist's report "provides the first indication that evidence may exist which shows that at the time of the offense, defendant was under the influence of extreme mental or emotional disturbance or that he was unable to conform his conduct to the requirements of law."¹¹ Further, the dis-

II. Rehearing order at 1.

strict court found that the report shed light on factors(b) and (f) of the mitigating circumstances wnummerated in Florida's death penalty statutes.¹² See Fla.Stat.Ann. §921.141(6) (West Supp. 1982).

These findings clearly support the conclusion that counsel was ineffective and that this ineffectiveness causes actual and substantial disadvantage to the petitioner's defense. Part IIA of Judge Vance's opinion correctly establishes the general proposition that, if counsel make a reasonable strategic choice to rely upon one plausible line of defense at trial, his failure to conduct a substantial investigation into another plausible line of

¹². As the district court noted in its earlier order, however, any mitigating evidence may be considered by a sentencing judge, whether or not it is specifically listed in the statutes. Order at 10; Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

defense at trial, his failure to conduct a substantial investigation into another plausible line of defense does not constitute ineffective assistance. Slip op. at 15852-15855, ___ F.2d at ___ __ __. But when counsel for "no strategic reason" fails to conduct a substantial investigation into a plausible line of defense, the attorney fails to render effective assistance. Slip op. 15856-15857, ___ F.2d at ___ __ __. Thus, this case turns on the question whether counsel made a strategic choice, and, if so, whether his strategy was reasonable.¹³

¹³. Because I conclude that the district court in effect found that counsel did not make a strategic choice, it obviously is not necessary to reach the question whether the strategy was unreasonable. I note, however, that for the strategy to be reasonable, the assumptions upon which it is based cannot be formed with no investigation at all. *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Even in *Gray v. Lucas*, 677 F.2d 1086, 1093 (5th Cir. 1982), a case which the majority cites

Three elements of the district court's findings of fact point to the conclusion that counsel's failure to investigate had nothing to do with strategy.¹⁴ I review these elements considering only the findings of fact as described in the district court opinion, reserving for independent judgment the ultimate determination of whether counsels's actions constituted ineffective assistance. See Pullman-Standard, supra, 102 S.Ct. at 1788 n. 16.

(Footnote 13 continue) as supporting the proposition that a strategic choice is sometimes permitted without investigation, see slip op. at 15853 & n. 20, ___ F.2d at ___ & n. 20, the court found some investigation necessary before deciding not to pursue a certain line of defense: "Had [counsel] failed to [interview some of the witnesses], we might reach a different result." 677 F.2d at 1093.

14. This conclusion may be reached by following either of two possible routes. The first is that the district court actually found that counsel's "decision" not to investigate was a non-strategic decision. This is indicated by the court's recitation of counsel's actual

First, although a counsel's action in failing to investigate is presumed strategic, "[t]his presumption can be rebutted... when trial counsel testified credibly at an evidentiary hearing that his choice was not strategic." Slip op. at 15856, ___ F.2d at ___. The district court cited just such testimony from Tunkey, in which he "couldn't say that [his failure to request a presentence investigation] was a

(Footnote 14 continue) reason for not investigating (his feeling of hopelessness), which was in no way "strategic." In light of the fact that the district court did not state this fact in words of one syllable, as Judge Vance seems to want it to do, a second, though less simple, course is available. According to the Supreme Court in Pullman-Standard, supra, 102 S.Ct. at 1792, "where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue." (emphasis added). The record in this case permits only the conclusion that counsel's non-action was not strategically motivated -as the district court's findings as to the real motivation for counsel's failure clearly suggest.

trial strategy."¹⁵ Moreover, given the district court's explicit finding that the reason for Tunkey's noninvestigation was his feeling of hopelessness, it is difficult to contemplate what more the district court must find on remand in order to conclude that strategy was irrelevant to his inaction.

Second, a presumption that counsel's action was strategic "can be rebutted ... where certain of counsel's actions do not conform to a general pattern of rational trial strategy." Slip op. p. 15856, ___ F.2d at ___. Under certain circumstances, it may be rational trial strategy to elect one course of investigation at the expense of another-particularly when two potential courses are inconsistent. See Slip op. p.

15. Because the presentence investigation and information from other witnesses all tended to support the same line of defense, Tunkey's failure to request a presentence report should be considered in the same light as his failure to seek

15855 n. 23, ___F.2d at ___n.23. In the case before us, however, Tunkey's strategy of relying on Washington's "sincerity and frankness" in pleading guilty would have been wholly consistent with a course of explaining to the sentencing judge his behavior by putting before the court Washington's background and circumstances. "When the lines of defense are consistent so that both could be presented at trial," Judge Vance's opinion suggests, "there may be a less compelling reason not to have pursued both prior to trial." Id. In the present case, the district court found no compelling reason and the record contains none. Hopelessness certainly is not a compelling reason.¹⁶

Third, analysis of the defenses actually offered to the sentencing judge confirms

(Footnote 15 continue) out supporting character witnesses.

16. In finding ineffective assistance, a

that Tunkey did not make a strategic decision to avoid the issue of Washington's background and circumstances. As indicated earlier, the sentencing judge heard just such evidence from Washington himself. Although this line of defense was weakly supported in the absence of evidence from family, friends, and neighbors, the government is hard pressed to argue that Tunkey pursued a "reasonable strategy" of not attempting to explain Washing-

(Footnote 16 continue) court need not necessarily impugn the general qualifications of the counsel in question. In the case of Mr. Tunkey, the record makes clear that, as a criminal attorney, he is eminently qualified and experienced. In this particular case, however, the district court notes that he was simply overwhelmed by the unique circumstances of his client's decision to plead guilty. See order at 15 n. 3. The issue before this Court is not the competence of Mr. Tunkey; it is only whether on this particular occasion counsel was effective. Cf. *Gray v. Lucas*, 766 F.2d 1086, 1094 (5th Cir. 1982) (unique circumstances of non-cooperation by client does not negate attorney's duty to conduct independent investigation).

ton's actions.¹⁷

Each of these considerations leads to the conclusion that Tunkey's action-or inaction-was not motivated by strategy, and thus that counsel was not effective. Yet Judge Roney in his dissent would have this Court hold that counsel was effective, apparently on the ground that Tunkey made a tactical decision to appeal to Judge Fuller's appreciation for those who make unqualified admissions of guilt. Such an argument misses the basic questions at issue in this appeal. As I have already suggested, Tunkey easily could have pursued

17. Judge Vance's recitations of facts that the district court must find seems to encompass more than just the question whether Tunkey's failure to investigate was the result of a strategic decision. Apparently, it would remand to determine: first, "[i]f ... there was more than one plausible line of defense in the case;" second, "if Tunkey made a strategic choice based upon reasonable assumptions to pursue one line of defense at the expense of another;" and third, "if that strategic choice was reasonable." Slip op. at 15857, ___F.2d

his strategy of appealing to Judge Fuller and, without undermining the effectiveness of that strategy, could have at the same time investigated Washington's background. The point is that, while Tunkey's approach to Judge Fuller certainly was strategy, his failure even to investigate other consistent defense was not. Tunkey himself claimed only that his approach to the sentencing judge was strategy. He never claimed that his non-investigation was based on strategy; the court's opinion below even stated that Tunkey had testified that he could not say it was strategy. Given the circumstances, it is difficult to imagine how Tunkey could have honestly testified otherwise-and to his credit he did not.

(Footnote 17 continue) at _____. As the above discussion indicates, the district court opinion already makes it abundantly clear that the court found that there was more than one plausible line of defense. It also concluded that counsel's inaction

More disturbing about Judge Roney's dissent, however, is its emphasis on the theory that this Court should consider the issue of effectiveness of counsel "with[] a full understanding as to what counsel was up against when Washington pled guilty to those brutal acts." By cataloging in detail what were clearly atrocious and shocking crimes, and by suggesting that we view counsel's omissions and errors in the context of these crimes, the implication is that somehow our standard of review for constitutional error should be more lenient when the crimes are more serious. Defense counsel has a sacred, professional duty to represent his client zealously. Particularly in death penalty cases, we should not turn our heads because a lawyer, however qualified and ex-

(Footnote 17 continue) was not a result of strategy. Thus, it is irrelevant whether counsel's assumptions were reasonable, and whether the "strategic choice" was reasonable.

perienced, felt a sense of hopelessness when faced with a difficult case. Otherwise, we would abandon our duty as judges to ensure that all defendants-not just those who commit non-brutal crimes-receive full due process protections and effective assistance of counsel.

Having concluded that Washington was deprived of effective assistance of counsel, I also conclude that the district court findings establish that the ineffectiveness caused actual and substantial disadvantage to the conduct of Washington's defense. I find clearly sufficient the court's repeated findings that an independent investigation might have uncovered supportive evidence.¹⁸ Also probative of this issue is the court's characterization of the April 1981 psychiatrist's report. In the rehearing order, the court stated that the report

18. See, e.g., order at 12, 14, 15, rehearing order at 1.

indicated that the petitioner was "under the influence of extreme mental or emotional disturbance or ... was unable to conform his conduct to the requirements of law." The court went on, however, to determine that "there is insufficient basis to conclude that findings consistent with [the April 1981] report would have been available to counsel" had he investigated in 1976. Because this Court holds that a petitioner need not prove a probable effect on the outcome of his case, the district court's latter finding was based on an excessively strict legal standard. Regardless of whether the 1981 report actually would have been available the first time, it is enough under the standard enunciated today that the existence of such a report indicates generally the extent and nature of counsel's omissions. When evidence of obvious importance might have been available in a case involving a

question of life or death, and counsel decided, because of a feeling of "hopelessness," not to independently investigate Washington's background at all, it is difficult to imagine greater possible disadvantage to Washington.

Thus, the district court's finding of fact have already completely determined that counsel's ineffectiveness caused actual and substantial disadvantage to Washington's defense. Otherwise, the record "permits only one resolution of the[se] factual issue[s]," so, applying the principles of Pullman-Standard, a remand is not the proper course as to these issues.¹⁹ I would remand only for a determination of whether the government can rebut the petitioner's showing of prejudice.

19. See note 14 supra.

RONEY, Circuit Judge, with whom FAY and JAMES C. HILL, Circuit Judges, join dissenting:

I respectfully dissent. Neither the rehearing en banc nor the recent opinion reversing the denial of a writ of habeas corpus in this case has changed my opinion from when I dissented from the panel majority's decision of this case. *Washington v. Strickland*, 673 F.2d 879, 907 (11th Cir. 1982). I will here merely echo what I wrote then.

I sketch again the facts because the only constitutional issue on appeal is whether the defendant had counsel at sentencing adequate to fulfill Sixth Amendment requirements. Our common knowledge tells us that there are very few attorneys in the United States who have represented a defendant who pled guilty to three such torturous, horrendous and time-related murders as these. Counsel's "effectiveness" cannot

be consider without a full understanding as to what counsel was up against when Washington pled guilty to those brutal acts.

On September 20, following carefully arranged plans, Washington stabbed to death Daniel Pridgen, a minister, while an accomplice restrained the victim and covered his face with a pillow. On September 23, in the presence of her three helplessly bound elderly sisters-in-law, petitioner murdered Mrs. Katrina Birk by stabbing her and shooting her in the head. Washington thereafter attacked the sisters-in-law with gun and knife, inflicting serious, permanent injuries. Finally, on September 29, Washington murdered Frank Meli, a twenty-year-old college student whom he had kidnapped two days before. While Meli was tied spread-eagle to a bed, Washington stabbed him 11 times. Although an accomplice had covered Meli's face with

a pillow, petitioner stated he heard his victim repeat the Lord's Prayer "over and over" during the fatal attack. Thus, Washington's victims included black and white, young and old, male and female, all intentionally murdered in torturous ways.

The suggestion in one of the opinion that reviewing the facts somehow indicates a lessened interest in defendant's constitutional rights misses the point. This was a sentencing hearing where the facts which established guilt were undisputed. That the facts would justify the death penalty under Florida law can hardly be questioned. Therefore counsel had to approach the case as one where mercy, not justice, was the goal. A lawyer who tried to argue that justice compels life, rather than death, might well foreclose his client's opportunity for mercy. The court

confuses the issues in relying on cases involving guilt-phase trials and the requirements of lawyers in those situations. There are not here the well-accepted standards that have been developed for the guilt phase of trials. Artistry is required, not a paint-by-numbers approach to advocacy.¹

Tunkey, Washington's court-appointed counsel, was a competent and seasoned criminal lawyer, thoroughly experienced in criminal and capital cases. Relying on his experience in prior capital case and his familiarity with his client and the trial judge, the attorney, faced with the above undisputed facts, reached a reasoned, tactical decision as to the only course of action which he thought could result in a sentence of life imprisonment rather

1. I agree with Judge Tjoflat and Hill that the initial inquiry as to whether a defendant who has the assistance of a

than a death sentence. Tunkey testified that the only strategy he believed to have a chance of success, given the predilections of the sentencing judge with whom he had become familiar in the course of his practice in the area, was the strategy he pursued.² Aware the judge normally responded favorably to a free, unqualified, unbargained for admission of guilt, Tunkey thought the only hope of leniency, given the nature of the crimes, was for Washington to show remorse and

(Footnote 1 continue) lawyer at a sentencing hearing has otherwise been constitutionally deprived should focus on how the defendant might have been prejudiced by that assistance, before examining whether what the lawyer did rendered him ineffective. I also agree with Judge Hill's observations concerning the impact of the affidavits upon which the majority has turned its decision.

2. As Tunkey explained at the habeas corpus hearing:

Q. You mentioned Judge Fuller would be more responsive to someone who pled guilty to the crimes.

seek mercy.³

We have consistently held that counsel

(Footnote 2 continue)

A. This is a very hard question to answer. But I think, as a trial attorney, I think that certainly one of the things which a trial attorney is responsible for is knowing, at least to some extent, the quirks and differences of opinion, political philosophy, philosophical approach to the law which varying judges demonstrate in their day-to-day activities.

One particular facet of Judge Fuller's personality, if you will, as a Judge, was simply that it was my personal feeling that if a person were guilty and I preface it with that, that if a person were guilty and came before the Court and pled guilty as opposed to going to court and hoping to "beat the case" and then losing, that that person was going to get a lighter sentence.

In other words, if there was a conviction obtained in either of the circumstances, that the person who pled guilty was more likely to get the lighter sentence. I am not saying that is right, but that was my personal opinion of the Judge at that time.

3. Tunkey testified:

To myself, I certainly thought if David had any chance at all, and I am really getting subjective, in front of this

will not be regarded constitutionally deficient merely because of tactical decisions. See United States v. Guerra, 628 F.2d 410 (5th Cir. 1980), cert. denied, 450 U.S. 934, 101 S.Ct. 1398, 67 L.Ed.2d 369 (1981); Buckelew v. United States, 575 F.2d 515 (5th Cir. 1978); Williams v. Beto, 354 F.2d 698 (5th Cir. 1965). Whether the tactic succeeds or fails is irrelevant. Indeed, even if the strategy chosen by counsel

(Footnote 3 continue)

particulat Judge, on these particular facts for these particular kind of crimes, that the one shot he perhaps had was the fact that he genuinely was coming before the Court and admitting his guilt, unlike some defendants who come in and plead guilty to avoid a harsher punishment.

Later in his testimony:

Q. Do you think that Judge Fuller would have been concerned about a defendant's remorse?

A. Oh, yes, I think that was all part and parcel of David's attitude in court and also to me out of court. This is why I had the strong feeling that this was the most important thing he had going for him. (Emphasis added).

should appear clearly wrong in retrospect, constitutionally ineffective representation does not automatically result. *Baty v. Balkcom*, 661 F.2d 391, 395 n. 8 (5th Cir. 1981); *Baldwin v. Blackburn*, 653 F.2d 942, 946 (5th Cir. 1981). Only if we apply 20/20 hindsight to second guess considered professional judgments, can we quibble with Tunkey's assessment of the most efficacious strategy to employ at sentencing. See *United States v. Johnson*, 615 F.2d 1125 (5th Cir. 1980); *Easter v. Estelle*, 609 F.2d 756 (5th Cir. 1980). In fact, there is evidence in the record that supports Tunkey's evaluation of the sentencing judge.⁴

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4. That Tunkey was correct in his assessment of the sentencing judge is illustrated by the following excerpts from the guilty pleas hearing:

THE DEFENDANT: I would like to say this. I believe the crime fits the punishment and I don't want to die. You understand what I am saying, bit I say if I got to sit up in some jail

Moreover, there has been no showing on this record that any other strategy would have had any likelihood of dissuading the judge from imposing the death penalty. In my judgment, in the absence of some possibility that another course of action would have benefited his client, the record compels a finding that Washington's attorney

(Footnote 4 continue)

and rot I would rather get the chair. THE COURT: We will resolve the question of punishment. I want you to be satisfied that I have a great deal of respect for people who are willing to step forward and admit their responsibility. That is not an automatic key to the door nor is it anything else. I am certainly satisfied you have been represented up to this point and will continue to be represented through Mr. Tunkey and I find him to be a very able and competent counsel and that you have had ample opportunity to discuss this matter with him, and in fact, are entering pleas in this case that take away from him the opportunity to really being a lawyer that he would like to be for you. But, I respect you for that and I think it speak in your favor.

There certainly is a factual basis for the Court to accept your pleas in this case and on that basis I will do so.

(Emphasis added).

was not constitutionally ineffective.

A remand is a fruitless prolongation of already protracted litigation because had the district judge come to any other conclusion on this record, he would have been in error as a matter of fact and wrong as a matter of law.

As before, I dissent from the majority's striking down the Florida Supreme Court's standard for reviewing ineffective assistance of counsel claims set forth in *Knight v. State*, 392 So.2d 997 (Fla. 1981), which followed *United States v. Decoster*, 624 F.2d 196 (D.C.Cir. 1976) (en banc), cert. denied, 444 U.S. 944, 100 S.Ct. 302, 62 L.Ed.2d 311 (1979). The district court should not be reversed for following the same standard.

The Decoster formulation of the requirement to show prejudice was not that defendant bear the burden of proving actual prejudice but that "defendant must demon-

strate ... a likelihood of effect on the outcome. In that event, the Government would have the burden of showing that there was in fact no prejudice in the particular case." 624 F.2d at 215. The majority would replace this rule with its own formulation based on the explication in *United States v. Frady*, ___ U.S. ___, ___, 102 S.Ct. 1584, 1590, 71 L.Ed.2d 816, 832 (1982), of the prejudice portion of the cause and prejudice standard required to obtain collateral relief based on trial errors to which no contemporaneous objection was made. The majority requires a defendant to show that "ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of his defense," Slip op. at 15862, ___ F.2d at ___, while reserving for the state "the ultimate burden of showing that any constitutional error that did occur was harmless beyond a reasonable doubt." *Id.* Slip

op. at 15862, at ____.

Once again semantics and appellate theory have been substituted for sound reasoning and real life requirements of the courtroom. How can counsel's ineffectiveness at the sentencing phase of a capital case result in actual and substantial disadvantage to the defense without some likelihood of its affecting the outcome?

In my view the majority has changed the words of the prejudice requirement without changing any practical effect. Yet by changing the formulation, the Court has drawn a bright constitutional line between what the Florida Supreme Court, several district courts in this Circuit, and other courts have found constitutionally acceptable. Not one circuit has specifically rejected Decoster, some circuits have standards of review that are similar, e.g., *McQueen v. Swenson*, 498 F.2d 207, 220 (8th

Cir. 1975), and others seem to assume that where prejudice must be shown, it must run to the outcome of the proceeding about which the petitioner is complaining. E.g., *United States v. Williams*, 575 F.2d 388, 393 (2d Cir.), cert. denied, 439 U.S. 842, 99 S.Ct. 134, 58 L.Ed.2d 141 (1978).

Surely there is room in constitutional law to permit various verbalizations. The district court here found there was no likelihood that what Tunkey could have done, but did not, would have altered the sentence.⁵ That finding should be sufficient to support the court's denial of relief, no matter what standard may be developed ultimately as to the level of showing a defendant must make.

5. The district court concluded that "reviewing the proposed character and psychiatric testimony, and weighing it against the detailed record of petitioner's conduct initiating and carrying out three separate episodes of planned robbery, kidnapping and murder, there does not appear to be a likelihood, or even a

Finally, the majority would reverse because the state sentencing judge testified at the federal evidentiary hearing as to the weight he accorded mitigating and aggravating factors in the case and as to whether the evidence Washington urges would have made a difference. I would not reverse on the impropriety of the admission of that testimony. Even if the testimony were inadmissible, its admission was harmless error because there is insufficient evidence in the record to support a decision for Washington.

This record compels the decision that Washington was not deprived of constitutionally effective counsel. Even if some fault can be found in his counsel's conduct, there is no showing that it resulted

(Footnote 5 continue) significant possibility that the balancing of aggravating against mitigating circumstances under the Florida death penalty statute would have been altered in petitioner's favor."

in any disadvantage to Washington or that a different strategy at sentencing would have had any likelihood of affecting the sentence of the state court. I would affirm.

JAMES C. HILL, Circuit Judge, concurring in the dissenting opinion of RONEY, Circuit Judge.

Judge Vance has prepared for our court a most valuable cyclopedia on the subject of the duty of defense counsel in criminal cases to conduct investigations. It should be taught in law schools and seminars. I do not mean to detract from the value of the compilation as such. However, I dissent from the holding that, in a habeas corpus case alleging ineffectiveness assistance of counsel the district judge's inquiry should first address the duties imposed upon counsel as articulated in Part II.

When a person in custody resulting from a criminal conviction petitions for the writ of habeas corpus asserting that his conviction was unconstitutional because, at his trial, he was not afforded adequate counsel, the issue before the court is the defense afforded him at the trial resulting in the conviction. If that trial were constitutionally conducted, there is no merit to the petition. The majority opinion shifts the inquiry, in the first instance, from the challenged trial to the challenged defense attorney. District Judges are instructed that they should pay no attention to the defendant's trial until and unless they have first convicted his lawyer. Assertions by the petitioner that his lawyer failed to live up to the high standards of our profession are to be meticulously investigated and evaluated in the abstract. Every asserted act or omission of defense counsel (often, as

in this case, willing to accept appointment to the case) is to be measured against the professional standards of lawyers. When the work of the lawyer has been gone over with a fine-toothed comb, and some of that work has been found to have been less than desirable, those findings are to be announced. When the lawyer has been found guilty of something less than the ideal, only then does the judge turn his attention to the defense afforded the petitioner. It then appearing that the failings of defense counsel worked no prejudice to the petitioner's defense, the petition is to be denied.

In my opinion, this stands the inquiry on its head. The petitioner is complaining that he did not receive a constitutional trial leading to a constitutional conviction. Therefore, what he alleges about his trial should be the beginning, and often

ending, inquiry. The petitioner must assert that there were errors of commission or omission by his attorney which, had they not been committed, would have benefitted his defense.¹ Further, he must assert that those errors were the result of inadequate counsel. Therefore, the district court's first inquiry should be whether or not the failure of defense counsel to have located and produced a witness was the result of incompetency if it now appears that the witness has been located and, had he been produced, would have given nothing but harmful testimony to the defense. If the petitioner gave his attorney a lead to the location of a witness who might have been of assistance, and if the attorney is said to have ignored the lead, choosing to attend an

1. I agree that Judge Roney's analysis of the prejudice requirement and am satisfied with the standard set out in United

attractive social function rather than devote the time to the location of the witness, that assertion need not be investigated and evaluated by the district judge if it appears that the witness has now been located and never had any information material to the case as all. The opinion for our court authored by Judge Vance would require the district judge to ignore the result of claimed incompetency; take evidence and make findings of facts as to whether or not the lawyer did abdicate his duty to investigate the witness in favor of attending a social function; and only then take note of the fact that neither the presence or absence of the witness could have had any effect, one way or another, on the trial.

(Footnote 1 continue) State v. Decoster, 624 F.2d 196 (D.C.Cir.) (en banc), cert. denied, 444 U.S. 944, 100 S.Ct. 302, 62 L.Ed.2d 311 (1979), but find little difference in this standard and that derived

I have a sincere and abiding interest that trial counsel do their professional work according to high professional standards. However, it is not the work of the district court considering a petition for habeas corpus gratuitously to "grade the paper" of the lawyer unless it first be shown that, had the lawyer conducted the defense in the manner preferred by the petitioner, it would have benefitted the petitioner. It is, after all, the petitioner's trial and conviction that is under investigation.

I have not overlooked the departure in the majority opinion's footnote 33 from the mandate otherwise articulated in the opinion. In note 33, the majority suggests that there might be some occasions when obvious lack of prejudice would make it unnecessary to determine whether or not

(Footnote 1 continue) from United States v. Prady, U.S. , 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816 (1982).

defense counsel's omission or commission was the result of inadequacy. I submit that what should be the rule is, in footnote 33, made the exception. District judges are hardly to be expected to find the proper procedure in that footnote contrary to the directions given in the body of the opinion, and, particularly, in its conclusion. Holdings expressed in footnotes are often given little weight. See *Miree v. DeKalb County*, 433 U.S. 25, 33, 97 S.Ct. 2490, 2495, 53 L.Ed.2d 557 (1977).

In the case presently under review, the district court properly pertermitted deciding whether or not the claimed omissions of attorney Tunkey amounted to incompetency or inadequacy on the part of the attorney because the district court found that no prejudice resulted from the omission and, upon that finding, denied the writ. I should affirm that finding, denied

the writ. I should affirm that finding. I have reviewed every affidavit of the witnesses said to have been overlooked by attorney Tunkey. The absence of the testimony of those witnesses at sentencing does not demonstrate the absence of any evidence likely to have had an effect on the outcome. Some of the tendered affidavits are of potential witnesses saying that he or she was surprised that petitioner stabbed a minister to death in the minister's church, bound four elderly women and then methodically stabbed them; and, after kidnapping a young man, tied him spread-eagle on a bed and, while his face and head were covered with a pillow, stabbed him eleven times, producing his death. It is hard to conceive of a person about whom it might not be said that such conduct was surprising. Other suggested witnesses would have disproved mental condition as a mitigating circum-

stances while others would have testified to petitioner's need for money, thus tending to substantiate that robbery for gain accompanied these murders. Proof that these witnesses were not called, whether by choice of strategy or otherwise, does not authorize the grant of the writ and, the district court was correct in that conclusion.

I take note that the district court heard the testimony of the sentencing judge to the obvious effect that the testimony of these witnesses would not have affected the imposition of sentence. I agree with Judge Roney that the propriety of the taking of this evidence need not be decided. The district judge made it clear that this testimony was not a controlling factor in his decision, finding the record otherwise demanded the conclusion that no prejudice had resulted. Whether or not the sentencing judge should

be permitted to testify should await a case in which the issue is presented. However, I offer these observations.

First, if such evidence is to be excluded, that ought not be based upon any notion of lack of reliability. The progress of cases of this sort through the state-federal apparatus is such that years usually pass before there is an occasion for the taking of testimony in a federal habeas court. Therefore, all witnesses before the habeas court are recounting facts, observations, opinions and impressions of years earlier. I know of no characteristic forgetfulness of judges which would make them less reliable than other witnesses called upon to testify to such prior events. The district judge is empowered, and has the ability, to appraise the effect upon credibility of the remoteness in time of the events.

Second, I question that there should be a blanket prohibition against the taking of the testimony of a sentencing judge were he to offer to say that, had he been aware of the evidence overlooked by defense counsel, he would not have handed down a death sentence.

There are, however, serious institutional implications in permitting the calling of the sentencing authority to the stand in the habeas court. Where that authority is the jury, should jurors be permitted to testify, perhaps to impeach their verdict? If not, is there equal protection if the judge, as sentencing authority, is subject to being called?

The issue need not be decided today?

With these remarks, I concur in the dissenting opinion of Judge Roney.

IN THE CIRCUIT COURT
OF THE ELEVENTH JUDI-
CIAL CIRCUIT OF FLORIDA,
IN AND FOR DADE COUNTY

CASE NUMBERS 76-8300 A,
76-9542,
76-9543
(JUDGE MARIO GODERICH)

THE STATE OF FLORIDA,

Plaintiff,

vs.

DAVID LEORY WASHINGTON,

Defendant.

ORDERING DENYING
MOTION FOR POST-
CONVICTION RELIEF
FILED PURSUANT TO
FLORIDA RULE OF CRI-
MINAL PROCEDURE
3.850

THIS CAUSE has come on before this Court upon the Motion of the above Defendant for relief pursuant to Florida Rule of Criminal Procedure 3.850. The record reflects that the Defendant was indicted in the Fall of 1976 for three counts of Murder in the First Degree and related multiple counts of Robbery, Kidnapping for Ransom, Breaking and Entering and Unlawfully Assaulting Persons Therein, Attempted Murder in the First Degree (three

counts) and Conspiracy to Commit Robbery. On December 1, 1976, the Defendant entered pleas of guilty to all these offenses. A sentencing hearing was held on December 6, 1976, after which the Defendant was sentenced to death by Circuit Judge Richard S. Fuller. The Florida Supreme Court affirmed the Defendant's sentences in an Opinion filed September 7, 1978. Washington v. State, 362 So.2d 658 (Fla. 1978). On March 13, 1981, the Governor of the State of Florida signed a Death Warrant requiring the Defendant's execution on some day of the week beginning Friday, the 3rd day of April, 1981, the Defendant filed Motions to Vacate herein alleging numerous grounds why the sentence of death imposed by Judge Fuller should be vacated. After a thorough review of the Motions and the files and records in this cause, and after hearing arguments of counsel and being duly advised in the premises, it is

the judgement of this Court that the Motions and files and records in this case conclusively show that the Defendant is entitled to no relief and accordingly, the Defendant's Rule 3.850 Motions are DENIED.

The Court feels compelled to render this written Order explicitly stating its reasons for denying the Motions. As part of this Order, the Court hereby directs the Clerk of the Circuit Court of the Eleventh Judicial Circuit to attach to this Order, pursuant to the provisions of Florida Rule of Criminal Procedure 3.850, the following portions of the case file and record which conclusively show that the Defendant is entitled to no relief: The transcripts of hearings held on October 13, 1976, November 22, 1976, and November 24, 1976; the transcript of plea held on December 1, 1976; the transcript of sentencing proceedings held December 6, 1976; the transcript of proceedings of September 23, 1980; the exhibits

admitted into evidence at the plea and sentencing proceedings, including but not limited to the defendant's confessions in all three of these cases; the written sentences of death as to each of the three counts of Murder in the First Degree entered by Judge Fuller on December 15, 1976; the mandate of the Supreme Court of Florida with the attached Opinion filed September 7, 1978; the Defendant's Motions to Vacate filed on September 10, 1980 in all three of these cases and the orders denying the motions without prejudice; and the report of Sanford Jacobson, M.D., who conducted a psychiatric evaluation of the Defendant on October 7, 1976, which report is contained in the initial Magistrate's file in this case, and which report was made part of this record at the hearing held on March 25, 1981, without objection by the Defendant.

Following a thorough review of the Motions to Vacate and the files and records in this

case and after hearing argument of counsel and being otherwise duly advised in the premises, the Court is convinced that the Motions to Vacate filed by the Defendant are patently frivolous on their face, and that it can conclusively be said that as a matter of law the Defendant is entitled to no relief. In reaching this conclusion, the Court has engaged in a three-step analysis. First, the Court has exhaustively examined each of the grounds for relief raised in the Motions and the factual allegations and supporting exhibits in order to determine if any of them state a recognized ground for relief. Secondly, the Court has thoroughly examined the files and records in this case in order to see if the factual allegations in the Motions are conclusively refuted by the files and records. Finally, the third step in the analysis made by this Court was to examine any unrefuted factual allegations

in the Motions, together with the files and records of this case, in order to determine whether or not they set forth sufficient factual and legal grounds to entitle the Defendant to any evidentiary hearing. In reviewing the Defendant's specific allegations concerning the effectiveness of his counsel at the sentencing proceeding, the Court has evaluated the claims raised by the Defendant in accordance with the standards set forth by the court in Knight v. State, ___ So.2d ___ (Fla. 1980), Fla. S.Ct. Case No. 59,741, Opinion filed February 24, 1981. The Court will now review each and every one of the Defendant's allegations and state the reasons why the record and files conclusively show that the Defendant is not entitled to an evidentiary hearing or relief.

ALLEGATION OF INEFFECTIVE ASSISTANCE
OF COUNSEL AT THE SENTENCING PROCEEDING.

The primary ground for relief raised by the Defendant in this case is that he was de-

prived of effective assistance of counsel at the sentencing proceeding in this case. The Court notes that nowhere in his Motions does the Defendant allege that his pleas of guilty were not knowingly, intelligently and voluntarily made or that he did not receive effective assistance of counsel at the plea proceedings. The only allegations he makes relate solely to the sentencing proceeding. The Court has examined each of the allegations in detail and in light of the files and records of this case and is convinced that when viewed either individually or collectively, the allegations contained in the Motions do not set forth a prima facie showing of ineffective assistance of counsel so as to entitle the Defendant to an evidentiary hearing.

It is important that the specific allegations made by the Defendant be placed in their proper context. Any reasonably compe-

tent attorney can, with 20/20 hindsight, look at any case and say he would have done things differently than the attorney who actually litigated the case. In determining whether a Defendant has been provided with reasonably effective assistance of counsel, the Supreme Court has adopted a four-step process as a means to discover a true miscarriage of justice without placing the judiciary in the role of interfering with defense counsel's legal and tactical conduct. Knight v. State, supra. Since, in the case at bar, it is the ruling of the Court that the Defendant's Motions, on their face, fail to establish a prima facie showing of ineffective assistance of counsel sufficient to entitle the Defendant to a hearing only the following three principles stated in Knight are applicable:

"First, the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must

be detailed in the appropriate pleading."

"Second, the defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel. As was explained by Judge Leventhal in Decoster III: "To be 'below average' is not enough, for that is self evidently the case half the time. The standard of shortfall is necessarily subjective, but is cannot be established merely by showing that counsel's acts or omissions deviated from a checklist of standards." 624 F.2d at 215. We recognize that in applying this standard, death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstances."

"Third, the defendant has the burden to show that this specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings. In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error." [Emphasis added].

The files and records in this case show that the Defendant pleaded guilty to murdering and robbing three different people on three different dates in ~~one~~ twelve-day period; he pleaded guilty to the attempted murder of three other individuals and to kidnapping for ransom, breaking and entering dwelling and committing an assault therein and conspiracy to commit robbery. One of the three victims of the attempted murders remained in a comatose state and the State has pointed out that she died without regaining consciousness more than a year later. The Defendant expressly waived his right to a jury during the sentencing phase of his trial and specifically requested that the trial court determine punishment without a jury.

The trial judge, Richard Fuller, found that multiple aggravating circumstances existed in each of these cases. Without repeating them here, the Court notes that the record

fully supports Judge Fuller's findings with respect to each of the aggravating circumstances found to exist and the Supreme Court fully concurred in his findings. These aggravating circumstances found to exist herein are simply overwhelming.

Significantly, the Defendant does not contend that his attorney, William Tunkey, was ineffective by failing to rebut the existence of any of these statutory aggravating circumstances. In fact, the record shows that Mr. Tunkey, whom this Court recognizes as one of the leading criminal defense attorneys in Dade County, anticipated that the State would attempt to use the Defendant's simultaneous conviction in the Pridgin murder as an additional aggravating circumstance in the subsequent Birk and Meli murders, pursuant to Section 921.141(5)(b) Florida Statutes; that he raised this issue prior to the plea proceedings, and that Judge Fuller ruled

that this aggravating circumstance would not apply because the statute required a prior conviction. [Transcript of November 24, 1976 at 6 (Record-on-Appeal at R. 26)]. Though the State Attorney argued at sentencing that this aggravating circumstance would apply, Judge Fuller did not so find. In retrospect, this Court notes that under the Supreme Court's subsequent decision in Lucas v. State, 376 So.2d 1149 (Fla. 1979), the trial judge was incorrect in not applying this aggravating circumstance to these facts. Certainly, Mr. Tunkey very effectively represented his client in this regard.

It is also significant that the Defendant does not allege that his attorney failed to properly investigate and present evidence tending to establish any statutory mitigating circumstances under Section 921.141 (6) Florida Statutes. Though defense counsel, William Tunkey, argued that Sections 921.141(6) (a) (b) and (c) should apply, Judge

Fuller found no statutory mitigating circumstances and the Supreme Court agreed. No evidence even tending to establish a statutory mitigating circumstance has been presented to this Court in the present Motions to Vacate, and this Court finds that the Motions are wholly devoid of any factual allegations which would even tend to establish that Mr. Tunkey was ineffective on this basis.

The Defendant does allege six specific acts of omission by his counsel which, he alleges, demonstrate that his counsel was ineffective and require an evidentiary hearing. The Court has examined each of these allegations in detail and reaches the following legal conclusions:

1. The Defendant alleges that his trial attorney failed to seek a continuance after the guilty plea proceedings in order to gain sufficient time to prepare and present the

Defendant's case for sentencing. The record reflects that Defense Attorney William Tunkey was appointed prior to the Defendant's arraignment in case number 76-8300, which was held on October 13, 1976. See R 1-R 10. Mr. Tunkey requested Discovery at that time, and was provided with complete Discovery by the State, including statements of all witnesses. Mr. Tunkey did move for a continuance of trial on November 24, 1976 [transcript, page 5 (R. 25)], which was denied by Judge Fuller. On December 1, 1976, the date set for trial, the Defendant entered his guilty pleas. See R 31-R. 66. At the conclusion of the plea colloquy, Judge Fuller specially observed that:

"THE COURT: I am sure Mr. Washington would like to have it terminated one way or the other at the earliest opportunity rather than worrying about it. We will go ahead and do that. We will set it down for trial after I call my morning calendar." R. 66.

Nobody disputed Judge Fuller's observation. Sentencing was five days later. R. 70-R. 2236. This Court is convinced that this record would show no grounds for defense counsel to seek or obtain a further continuance of the sentencing proceedings in this case. Indeed, as noted below, the matters presented even now by new defense counsel add nothing to change this view.

2. The Defendant alleges that Mr. Tunkey failed to obtain or request from the court a psychiatric or psychological evaluation of the Defendant to determine whether there were any statutory or non-statutory factors in mitigation created by the Defendant's mental state at the time of the crimes. He attaches to his Motion the reports of a psychologist and a psychiatrist, both dated September, 1980. First of all, the Court notes that the files and records in this

case reflect that a psychiatric evaluation of the Defendant was ordered by Judge Herbert M. Klein on October 2, 1976, in connection with the Meli murder case, and that Psychiatrist Sanford Jacobson, M.D., the Director of Forensic Service at Jackson Memorial Hospital, did conduct a psychiatric evaluation on October 7, 1976. Dr. Jacobson's report, filed with the Magistrates Division of the court, indicates that there was no evidence of any psychosis on the part of the Defendant, and that there was nothing which would indicate that the Defendant was suffering from any major mental illness at the time of the offense.

Secondly, this Court notes that Exhibits 16 and 17 submitted by counsel for the Defendant as exhibits to his Motion to Vacate are consistent with the report of Dr. Jacobson. In Exhibit 16, Psychologist David Lane states that he examined the Defendant on March 19, 1980, and found that there was no evidence to

support the view that the Defendant was legally insane or, psychiatrically-speaking, psychotic at the times of the crimes. The report of the Psychiatrist George W. Bernard is even more explicit. Dr. Bernard states that he interviewed the Defendant on May 10, 1980. He finds no indication of psychosis, and specifically states as follows:

"It is my medical opinion that, at the time these capital felonies were committed, while [the Defendant] was not under the influence of extreme mental or emotional disturbance, he was chronically frustrated and depressed because of his economic dilemma wherein he was unable to find employment and provide for his wife and children."

Rather than supporting a finding that mitigating circumstances may have existed which defense counsel failed to properly investigate, the very psychiatric exhibits submitted by the Defendant affirmately demonstrate the absence of statutory mitiga-

ting circumstances. As a matter of law, this Court cannot find that defense counsel was ineffective by failing to request psychiatric evaluations which would only serve to disprove the existence of statutory mitigating circumstances which defense counsel was arguing should be found to exist. This Court parenthetically notes that by relying solely upon the Defendant's testimony at the plea colloquy in support of his argument that the Defendant was under severe stress due to his unemployment, defense counsel was able to put this evidence on the record without subjecting his client to cross-examination, and without giving the State an opportunity to rebut the Defendant's claim with psychiatric testimony. Furthermore, in light of the overwhelming aggravating circumstances in this case, this Court concludes that as a matter of law, the alleged deficiency in counsel's representation

was neither a substantial and serious deficiency nor was it substantial enough to demonstrate prejudice to the defendant to the extent that there is a likelihood that the alleged deficient conduct could have affected the outcome of the court proceedings. In short, the allegation of the Defendant even if accepted on its face, is insufficient to entitle him to relief or to a hearing.

3. The Defendant's third claim is that counsel was deficient by failing to investigate and present witnesses as to the Defendant's character and personal history. In support of this allegation, the Defendant has attached a large number of exhibits (numbered 2 through 15) which purport to be affidavits of various friends, neighbors and members of the Defendant's family. An examination of these exhibits reveals that not one even remotely deals with a statutory mitiga-

ting circumstance. The best that could be said, assuming all these affidavits are taken on their face by the court, is that these individuals could have testified that the Defendant was a basically good person who had not been in trouble with the law on prior occasions and that he was worried about his family because of his financial difficulties at the time of these murders, a fact which was testified to by the defendant himself at the plea colloquy (In this manner, defense counsel was able to foreclose a cross-examination of his client on the question of how he spent the proceeds of his crimes). In the Court's view this is simply insufficient to establish that Mr. Tunkey was ineffective in not finding and putting on these witnesses. In his sentencing order Judge Fuller found, and the Supreme Court of this State approved of his finding, that the Defendant had admitted both in his

confession and at his plea colloquy, to committing a string of burglaries and to selling stolen property to one of his victims, Mrs. Birk. This fact alone rebuts many of the factual allegations contained in these affidavits. But this Court also notes that Judge Fuller specifically found that even if the Defendant was considered to have no significant history of prior criminal activity, the aggravating circumstances of this case would still "clearly far outweigh" this factor of mitigation. See, R. 594. In short, this Defendant cannot satisfy the second and third principles of the Knight decision. He cannot show that counsel's failure to call these witnesses at the time of sentencing was a substantial and serious deficiency, and he certainly cannot show prejudice to the extent that the outcome was likely to be different.

4. The Defendant's fourth claim is that his attorney failed to request a pre-sentence

investigation. The Court notes that the Supreme Court of this State has held that a pre-sentence investigation is wholly discretionary in a capital case and has indicated that ordinarily one should not be ordered. See, e.g., Hargrave v. State, 366 So.2d 1 (Fla. 1978). Thus, there is no guarantee that had counsel requested a pre-sentence investigation, Judge Fuller would have ordered one. Secondly, this Defendant does not offer to this Court what such a pre-sentence investigation might have disclosed. However, this Court in examining the record finds that the trial court, upon objection by defense counsel, had refused the State's request to admit the defendant's "rap sheet" at the sentencing hearing. See R. 224-R. 225 Had a pre-sentence investigation been ordered, the Defendant's "rap sheet" would have certainly been presented to the trial judge as part of that report.

The Court cannot find that the failure to request a discretionary pre-sentence investigative report was a serious deficiency on the part of counsel where there is a strong likelihood that had one been ordered, it would have proved unfavorable to the Defendant and would have provided additional evidence with which to rebut his claim that he had no significant history of prior criminal activity.

5. The Defendant's fifth complaint is that his counsel failed to present a meaningfully and factually supporting closing argument and sentencing memorandum. The Court has examined the closing argument and sentencing memorandum of counsel and is convinced that in light of the overwhelming aggravating circumstances in this case, and the substantial absence of mitigating circumstances, the effort presented by Mr. Tunkey was admirable.

6. Finally, Defendant alleges that his counsel was deficient in failing to investigate and undertake an independent examination of the reports of the Medical Examiners or conduct any meaningful cross-examination of these persons at the sentencing hearing. The Court finds this allegation to be patently frivolous in light of the fact that the testimony of the Medical Examiners, specifically Dr. Wright with respect to the manner of Frank Meli's death, and Dr. Fernandez with respect to the manner of Daniel Pridgen's death, was fully corroborated by the Defendant himself in his own confessions. Under the circumstances, the Court wonders what point there would have been for defense counsel to cross-examine these experts.

In conclusion, under the decision of the Supreme Court in Knight, it is the Defendant who has the burden of showing that his counsel was substantially and seriously defi-

cient, and that the deficiency was substantial enough to have affected the outcome of the court proceedings. The ultimate question before this Court is therefore, whether the Defendant has met his burden of establishing that had Mr. Tunkey done each and dvery one of the things which the Defendant alleges he failed to do, it is likely that the outcome might have been different. The Court specifically finds that as a matter of law, the record affirmatively demonstrates beyond any doubt that even if Mr. Tunkey had done each of the foregoing things at the time of the sentencing, there is not even the remotest chance that the outcome would have been any different. The plain fact is that the aggravating circumstances proved in this case were completely overwhelming, and that even to this date the Defendant cannot show that any statutory mitigating circumstances existed. The non-

statutory mitigating circumstances which he claims his attorney failed to investigate and present at the time of sentencing would as a matter of law, be insufficient to outweigh the multiple aggravating circumstances present in this case. This is not a close case where the presence of such non-statutory mitigating circumstances might tip the balance in favor of a life sentence.

The Florida Death Penalty Statute is constitutional only because the sentencing guidelines it contains serve to eliminate total arbitrariness and capriciousness in the application of the death penalty. To be constitutional, not only must the death penalty not be imposed in cases where it is not warranted, but it must be imposed in cases where it is the only appropriate penalty. As a matter of law, this Court finds that the additional circumstances in mitiga-

tion which the Defendant alleges that his trial counsel failed to present are insufficient even to permit a court to impose a sentence less than death. To paraphrase the Supreme Court of Florida when it held in this case that the fact that the Defendant had pled guilty did not require a life sentence, the claim of ineffective assistance of counsel presented by the Defendant is indeed too slender a reed upon which to require a hearing and to rest a reversal of the death sentences in this case, in light of the vast array of aggravating circumstances present.

FAILURE OF TRIAL JUDGE TO
ORDER PRESENTENCE INVESTIGATION.

The Court finds that under the law of the State of Florida, the trial judge is not obligated to order a presentence investigation. Hargrave v. State, 366 So.2d 1 (Fla. 1978); Thompson v. State, 328 So.2d 1 (Fla.

1976). Accordingly, the failure to order one is not grounds for relief in this case.

ALLEGATION THAT TRIAL JUDGE
ENTERED A "PRESUMED" DEATH SENTENCE.

The Court finds this allegation to be patently frivolous. Referring to the transcript of the plea colloquy on December 1, 1976, at page 28 (R. 58), the Court finds that the allegation of the Defendant is conclusively rebutted by the record. The transcript reflects that Judge Fuller wanted to be absolutely certain that no promises concerning leniency had been made to the defendant in order to induce him to enter a plea of guilty. See Thompson v. State, 351 So.2d 701 (Fla. 1977); Surace v. State, 351 So.2d 702 (Fla. 1977). Judge Fuller made it clear that he intended to follow the law and had not pre-judged the case:

"THE COURT: You may just as well get the death penalty from me as not. I will follow the law. I am not one of those judges that will

automatically not give the death penalty. Do you understand that?"

"THE DEFENDANT: I do."

"THE COURT: These counsel and officers of the Court will stay strictly away from me. There will not be a bit of discussion about your case, I can guarantee it, outside this courtroom, and I don't want you ever coming back here, if in fact it should be determined that I find the aggravating circumstances outweigh the mitigating circumstances and sentence you to death, and hear Mr. Tunkey or Pollock say somebody told you that was not what I was going to do."

"THE DEFENDANT: Yes, Sir. I understand."

"THE COURT: Has anybody told you there was any deal involved in my court?"

"THE DEFENDANT: No, Sir."

"THE COURT: I would sure like you to tell me if there was."

"THE DEFENDANT: I would like to say this. I believe the crime fits the punishment and I don't want to die. You understand what I am saying, but I say if I got to sit up in some jail and rot I would rather get the chair."

"THE COURT: We will resolve the question of punishment. I want you to be satisfied that I have a great deal of respect for people who are willing to step forward and admit their responsibility. That is not an automatic key to the door nor is it anything else." R. 58-R. 59.

The Court finds that the solemn declarations in open court conclusively refute the Defendant's allegations.

ALLEGATION THAT THE TRIAL JUDGE
FAILED TO CONSIDER NON-STATUTORY
MITIGATING CIRCUMSTANCES.

The Court finds that this allegation is also conclusively rebutted by the record. In fact, the foregoing transcript of the plea colloquy, December 1, 1976, at page 29 (R. 59), reflects that Judge Fuller was willing to consider non-statutory mitigating circumstances, and specifically the fact that the Defendant had entered a plea of guilty. In his Sentencing Order, Judge Fuller found no statutory mitigating circumstances existed, yet his statement with regards to the pro-

priety of the death sentence was that "insufficient mitigating circumstances" exist to outweigh the aggravating circumstances. This clearly indicates that Judge Fuller considered all non-statutory mitigating circumstances presented and argued by the Defendant, including the fact that he pleaded guilty, but did not consider this to be sufficient to outweigh the aggravating circumstances in this case. The Supreme Court in its opinion in this case fully agreed with Judge Fuller's assessment of the situation. Moreover, the Defendant has not presented this Court with any non-statutory mitigating circumstances which he claims were presented to but no considered by Judge Fuller.

ALLEGED INADEQUATE COLLOQUY
AT GUILTY PLEA

The Defendant's claim that the colloquy at the quilty plea proceedings was ambiguous

is, to say the least, absurd. The Court notes that the Supreme Court of Florida in Williams v. State, 316 So.2d 267 (Fla. 1975); and State v. Lyles, 316 So.2d 277 (Fla. 1975); has held that the mere failure of a trial judge to conduct a proper plea colloquy is not grounds to vacate a judgement and sentence absent a showing of prejudice to a defendant. A showing of prejudice presupposes a claim by the Defendant that he was unaware of the rights he was waiving, and that his plea was not voluntary. No such claim is raised by the Defendant in this case. In addition, the colloquy itself is so absolutely clear as to the voluntariness of the Defendant's plea and the advisements given to him by Judge Fuller as to render this claim patently frivolous. See, Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Specifically, this Court refers to pages 25 through 27 of the

transcript (R 55-R 57) which conclusively rebut the claim made by the Defendant.

ABANDONMENT OF MOTIONS TO SUPPRESS

This claim of the Defendant is also wholly rebutted by the transcript of the plea collquy at which the defendant repeatedly assured the Court that his statements, admissions and confessions were voluntarily and freely made to the police. In particular, the Court refers to pages 4 through 6, 10 through 11, 13 through 14, 18 through 21, 25 and 33 through 34 of that transcript. See, R 34-R 36; R 40-R 41; R 43-R 44; R 48-R 51; R 55; R 63-R 64.

INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL

The allegation of ineffective assistance of counsel on appeal is not cognizable before this trial Court in a Rule 3.850 Motion, but must be raised directly in the Supreme Court of Florida. The Court, however, paren-

thetically notes that no factual allegations are made in this Motion to support this purely conclusory paragraph, and were this issue cognizable before the Court, the Court would be impelled to deny it as being insufficient on its face.

FAILURE TO APPRISE DEFENDANT OF THE
GROUNDS UPON WHICH THE DEATH PENALTY
WOULD BE SOUGHT

The Defendant's contentions that he should have been apprised of the reasons upon which the State would seek the death penalty or of the grounds on which the trial court would consider imposing it has been specifically rejected by the Supreme Court in Mines v. State, 390 So.2d 332 (Fla. 1980); Clarke v. State, 379 So.2d 97 (Fla. 1979); and Menendez v. State, 368 So.2d 1278 (Fla. 1979), as well as by the Fifth Circuit Court of Appeals in Spinkellink v. Wainwright, 578 Fed.2d 582 (5th Cir. 1978). Accordingly, this presents no ground for relief.

CONSTITUTIONALITY OF DEATH
PENALTY STATUTE

In paragraphs 6(i) through 6(m), the Defendant attacks the constitutionality of the Florida Death Penalty Statute. These issues have already been resolved against him as a matter of law in prior decisions of the United States Supreme Court, the Florida Supreme Court, and the Fifth Circuit Court of Appeals as well as in the case at bar. None of them present a ground for relief under Rule 3.850. See, e.g., Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

INFLAMMATORY AND PREJUDICIAL PHOTOGRAPHS

The photographs admitted into evidence at the sentencing hearing were clearly relevant to the issues before the court. Accordingly, under well-established decisions of the Florida Supreme Court they were admissible. Booker v. State, ___ So.2d ___ (Fla.

1981), Fla. St.Ct. Case No. 55,568, opinion filed March 19, 1981; Straight v. State, ___ So.2d ___ (Fla. 1981), Fla. S.Ct. Case No. 52,960, opinion filed March 19, 1981. The Court also notes that the sentencing proceeding was without a jury to be inflamed or prejudice by these photographs, and that this issue was quite, justifiably, not raised on appeal. No grounds for relief are presented here.

ALLEGATIONS CONCERNING THE FINDINGS
OF THE TRIAL JUDGE WITH RESPECT TO
AGGRAVATING AND MITIGATING CIRCUMSTANCES

The grounds for relief presented by the defendant in his paragraphs 6(0) and 6(p) were, in fact, litigated before the Supreme Court on direct appeal and resolved against him. They are not cognizable in this proceeding. See, Witt v. State, 387 So.2d 922 (Fla. 1980); Burau v. State, 353 So.2d 1183 (Fla. 3d DCA 1977).

CONCLUSION

In conclusion, this Court reiterates its statement that based upon the standards set forth by the Supreme Court in Knight v. State, supra, this Court finds that an examination of the Motions in the files and records in this case conclusively show that this Defendant is not entitled to the relief he seeks. His allegations, including his allegations of ineffective assistance of counsel, considered separately or collectively, are completely lacking in merit so as to obviate the need for an evidentiary hearing into the matter. Accordingly, it is hereby,

ORDERED AND ADJUDGED that the Defendant's Motions for relief pursuant to Rule 3.850 are hereby denied. The Defendant is hereby advised that he has fifteen (15) days to file a Motion for rehearing and thirty (30) days to file a Notice of Appeal.

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DONE AND ORDERED in Open Court in Miami,
Florida on this 27th day of March, 1981.

David Leroy WASHINGTON,
Appellant,

v.

STATE of Florida,
Appellee.

No. 60403.

Supreme Court of Florida.

April 6, 1981.

Richard E. Shapiro, New Orleans, La.,
and David Lipman, Miami, for appellant.

Jim Smith, Atty. Gen., Calvin L. Fox,
Asst. Atty. Gen., Miami, Janet Reno, State
Atty., and Ira Lowey, Asst. State Atty.,
Miami, for appellee.

PER CURIAM.

David Leroy Washington appeals from a
trial court order denying his motion for post-
conviction relief under Florida Rule of Cri-
minal Procedure 3.850. Appellant requested
but was denied an evidentiary hearing on his
motion, and his request to stay execution

pending a final disposition was also denied. Having reviewed the record, we are unable to find merit in any of appellant's arguments which assail his sentence, and therefore affirm the trial court's denial of relief under rule 3.850.

Washington was convicted of first-degree murder and received on December 15, 1976, three separate death sentences from the trial judge after he entered pleas of guilty and expressly waived a sentencing jury. The judgments of conviction and sentences were affirmed by this Court on September 7, 1978. *Washington v. State*, 362 So. 2d 658 (Fla. 1978), cert. denied, 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979). On September 19, 1980, appellant filed an initial unsworn 3.850 motion with the trial court which was denied on October 2, 1980, nunc pro tunc September 23, 1980, without prejudice to refile with verification.

Following clemency proceedings, the Governor of Florida signed Washington's death warrant on March 13, 1981. The appellant, almost six months after his original filing, refiled his motion for post-conviction relief, essentially unchanged but for the addition of a verification by Washington dated September 29, 1980. After a hearing, the trial court denied all relief by order of March 27, 1981. It is from this order that the present appeal arises.

Appellant raises a broadside of challenges to his sentence, of which the most critical is his claim of ineffective assistance of trial counsel because his attorney (1) failed to seek a continuance after the guilty plea to prepare a case for sentencing; (2) failed to obtain or request a psychiatric report; (3) failed to investigate and present character witnesses; (4) failed to request a presentence investigation report; (5) failed

to present meaningful arguments to the sentencing judge; and (6) failed to investigate medical examiner's reports or to cross-examine those persons. Appellant contends that he has made a sufficient showing under rule 3.850 to deserve an evidentiary hearing and that the trial court erred in applying the principles of *Knight v. State*, 394 So.2d 997 (Fla. 1981), to deny his application absent an evidentiary hearing. We disagree. The standards of *Knight* do apply when assessing the sufficiency of a 3.850 motion predicated upon ineffective counsel, when determining whether the claim warrants an evidentiary hearing. Although we recognize that under both the terms of rule 3.850 and *Meeds v. State*, 382 So.2d 673 (Fla. 1980), the evidentiary hearing can only be denied if it is conclusively shown that appellant's motion lacks merit, we conclude that when the first three criteria of *Knight* for establishing ineffective

counsel are placed alongside of appellant's claims, those claims are shown conclusively to be without merit so as to obviate the need for an evidentiary hearing.

To each of appellant's initial six points, the state counters with arguments that the omissions were not substantial. But even more fatal, we can find no prejudice caused to appellant, even if we assume that every allegation he has made in his petition is true. Several contentions focus on the lack of proof of appellant's good character and his emotional and economic stress just prior to the murders. But equivalent proof was indeed placed before the sentencing court by Washington himself in the guilty plea colloquy, in which he attested to his troubles and that this was his first encounter with the law, all without being subjected to cross-examination. Nor was trial counsel's failure to obtain or

request a psychiatric evaluation prejudicial since all psychiatric evaluations conducted before and after sentencing failed to raise any evidence of significant mental disturbance or impairment. None of these reports raise any substantial legal or factual arguments in mitigation, and hence there could be no prejudice. Failure to request a pre-sentence investigation report does not establish prejudice since the results of such an investigation would be pure speculation. In any event, such a report is discretionary with the trial court. Hargrave v. State, 366 So.2d 1, 4 (Fla. 1978), cert. denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979).

[3] The record shows that trial counsel made a respectable argument on appellant's behalf at the sentencing hearing.* A confession plus numerous aggravating factors

*Indeed, counsel was successful in preventing the introduction of appellant's "rap sheet" at the sentencing hearing.

limit the alternative of the most zealous of advocates. Finally, counsel's failure to investigate medical reports and cross-examine the medical examiners could not be prejudicial since the facts of the reports were admitted by defendant in his confession. Under the circumstances cross-examination could have accomplished little. Indeed, cross-examination is a trial tactic choice properly within counsel's discretion. See *Ross v. State*, 392 So.2d 23 (Fla. 4th DCA 1980) (concurring opinion); *Robinson v. State*, 378 So.2d 1346 (Fla. 3d DCA 1980).

[4] In conclusion, on the claims of ineffective counsel, the appellant has failed under the Knight criteria to make a prima facie showing of substantial deficiency or possible prejudice and has failed to such degree that we believe, to the point of a moral certainty, that he is entitled to no relief under rule 3.850.

[5] Appellant also sought to include an assertion of ineffective assistance of appellate counsel as a basis for 3.850 relief. Because this claim did not relate to the judgment and sentence of the trial court, the court below properly declined to entertain the issue. For purposes of this appeal we shall treat the claim as a petition for writ of habeas corpus. Having now carefully considered the alleged ineffectiveness of appellate representation, we find no serious deficiencies causing prejudice to appellant, and we therefore deny habeas relief. See *Knight v. State*, 394 So.2d 997 (Fla. 1981).

Appellant presents fourteen asserted trial court errors or constitutional defects, ranging from the court's failure to request a pre-sentence investigation to a multitude of oft-repeated constitutional challenges to Florida's death penalty statute. Many of the issues have been conclusively decided

adversely to appellant's position. The balance are either without merit or have been waived. Hargrave v. State, 396 So.2d 1127 (Fla. 1981); Witt v. State, 387 So.2d 922 (Fla.), cert. denied, ___ U.S. ___, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980); Meeks v. State, 382 So.2d 673 (Fla. 1980); Adams v. State, 380 So.2d 423 (Fla. 1980); Sullivan v. State, 372 So.2d 938 (Fla. 1979).

Accordingly, the trial court's denial of appellant's motion for post-conviction relief is affirmed, and the motion for stay of execution is denied.

No petition for rehearing will be entertained.

It is so ordered.

SUNDBERG, C.J., and ADKINS, BOYD, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., Concur.

UNITED STATES DISTRICT
COURT SOUTHERN DISTRICT
OF FLORIDA

CASE NO. 81-722-CIV-CA

DAVID LEROY WASHINGTON,

Petitioner,

vs.

CHARLES E. STRICKLAND,
SUPERINTENDENT,

Respondent,

ORDER DENYING
PETITION FOR
WRIT OF HABEAS
CORPUS AND
CONTINUING STAY
FOR 48 HOURS

and

THE ATTORNEY GENERAL OF
THE STATE OF FLORIDA,
and LOUIS WAINWRIGHT,

Additional
Respondents.

SYLLABUS

Petitioner seeks a writ of habeas corpus under 28 U.S.C. §2254 requiring the state trial court to resentence him because of ineffective assistance of counsel and 14 deficiencies in the state proceedings or the Florida sentencing statute. The imminence of execution under a death warrant required

a stay pending consideration of the petition and an evidentiary hearing. For the first time, in the midst of the hearing, petitioner urged a violation of Gardner v. Florida, 430 U.S. 349, 358 (1977) asserting alleged failure to disclose to defendant and his counsel a psychiatric report by Dr. Jacobson found in the magistrate's file. The three separate death sentences, imposed by the state court pursuant to guilty pleas and waiver of a right to a sentencing jury, were affirmed by the Florida Supreme Court, 362 So.2d 658 (Fla. 1978). Post conviction relief was denied by the state trial court and affirmed by the Florida Supreme Court on April 6, 1981. The instant federal petition was filed that same date. An evidentiary hearing was held on April 9 and 10, 1981. "Historical" facts as found by the state court are accorded a presumption of correctness, nevertheless, the state court's ultimate conclusion as to the effectiveness of counsel is not binding on

this federal court since it involves a federal constitutional right. Mason v. Blakcom, 531 F.2d 717, 721 (5th Cir. 1976). Assuming all allegations made in the petition to this issue are true, the district court finds no prejudice to the petitioner has been shown after an evidentiary hearing. Lovett v. Florida, 627 F.2d 706, 710 (5th Cir. 1979), Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1979); United States v. Decoster (Decoster III), 624 F.2d 1979 (D.C. Cir. 1979) (en banc). Exhaustion on the Gardner issue should not be required in light of (a) the Jacobson letter's being appended to the state's response to the motion for post conviction relief affording both counsel and the state courts the opportunity for development and consideration of this issue; (b) determination of whether this issue is factually supportable requires consideration of fairly lengthy testimony not easily available to the state court, and (c) a finding of little merit to this contention.

In addition, the Court does not find it reasonable to conclude that the sentencing judge considered the Jacobson report in imposing sentences on the petitioner. The allegation of 14 additional deficiencies with the state proceedings are without merit.

HELD, the petition is denied and the stay of execution previously issued is continued for 48 hours to permit appeal

* * * * *

THE ABOVE CAUSE is before the Court on the petition of David Leroy Washington for a writ of habeas corpus pursuant to 28 U.S.C. §2254. A brief history of the case as it appears before this Court if appropriate.

I.

Following a hearing, Judge Richard Fuller of the Eleventh Judicial Circuit of Florida imposed three separate death sentences on petitioner, David Leroy Washington, pursuant

to his pleas of guilty and waiver of his right to a sentencing jury. The sentences were imposed December 6, 1976 and the judgments and sentences were affirmed by the Florida Supreme Court on September 7, 1978. Washington v. State, 362 So.2d 658 (Fla. 1978), cert. denied, 441 U.S. 937 (1979). Throughout the trial court level proceedings and on the direct appeal, Washington was represented by William Tunkey, a private attorney appointed by the Court. On September 19, 1980, appellant filed a motion for post conviction relief at the state trial court level, which was denied without prejudice on October 2, 1980, nunc pro tunc September 23, 1980 as being unverified. Following clemency proceedings, the Governor of Florida signed Washington's death warrant on March 13, 1981, setting execution for the week of April 6, 1981. The record indicates that the motion for post-conviction relief was refiled, with

the necessary verification, following issuance of the death warrant.^{1/} Following oral argument, the trial court denied the requested relief by a written order entered March 27, 1981; it was affirmed by the Florida Supreme

I/ Counsel for the state respondents has suggested that a corresponding right of the accused to speedy trial is the right of the public to speedy punishment of those convicted. The implication is raised that petitioner's delay in pursuing his post conviction avenues and in the filing of the instant federal petition less than 48 hours before the scheduled execution, is an improper tactic to frustrate the objectives of the law. Certainly it is proper for the judiciary to be ever vigilant for dilatory or purely frivolous maneuvers. In many proceedings, proper sanctions for such conduct may include summary dismissal. See, e.g. United States v. Dunbar, 611 F.2d 985 (5th Cir. 1980); 28 U.S.C. §1915(a). I find it difficult to conceive of Mr. Washington's deliberate agreement to a tactic of delay which could prove fatal to any potentially meritorious issue he might raise, and ultimately fruitless in outcome whatever the merits. Nor can counsel's actions in the instant case be conclusively characterized as improper. Finally, I note that adequate restrictions on the perhaps inherent tendencies of attorneys to procrastinate may be provided by reasonable statutory restrictions on the timing of permissible challenges, or judicially

Court on April 6, 1981. On that same date the instant federal petition pursuant to 28 U.S.C. §2254, was filed, and a brief hearing held the following morning to ascertain whether exhaustion had occurred and whether stay of the execution date set for April 8, 1981, pending further consideration of the issues raised, was appropriate. A stay was issued, and an evidentiary hearing set for Friday, April 10, 1981. The setting of that hearing resulted in the expiration of the death warrant at noon on that date. Testimony was heard for several hours on Friday, continuing for an hour on Saturday, April 11th. The court advised the parties that no further briefing would be required.

(Footnote 1 continue)

imposed limitations on the number of days available to refile an inadequate petition. In other words, state counsel's arguments about undue delay are uniquely unpersuasive in a death penalty case.

The brutality of the murders as to which Washington has confessed shock the consciousness of rational mankind; this sense of shock pervades the thoughtful and considered opinions of the state judge who sentenced Washington and of the justices of the Florida Supreme Court in their opinions on the direct appeal and their motion for post conviction relief. The instant petition for a writ of habeas corpus raises fifteen issues, of which only one, that of the allegation of ineffective assistance of counsel, argues any real issue of fact. The other issues, as will be briefly discussed at the end of this opinion, would have permitted dismissal on even the most cursory review of the record. However, the allegation of ineffective assistance of counsel, and particularly as to the alleged failure to investigate and argue mitigating circumstances, when combined with the affidavit of counsel stating Mr. Tunkey had confirmed the fact that he made only a limited

independent investigation of Washington's background, raised some concern on my part. In the absence of an evidentiary hearing, I felt unable to ascertain whether counsel's actions were consistent with Washington's constitutional entitlement of effective assistance of counsel. Under the Constitution and our ever-evolving notions of fairness and due process, it was my concern that whatever outrage is reasonably generated by the fact of petitioner's confession of murder, it should not be permitted to blind the eyes of his attorney to circumstances which may nonetheless have mitigated the sentence accorded to defendant.

I recognize that the filing of a federal habeas corpus petition raises the potential for conflict or friction to develop between state and federal courts. In an effort to minimize this friction, the factual findings of the state courts are accorded a presumption of correctness and the federal court is

required to accept these findings unless the petitioner demonstrates that (a) one of seven statutorily enumerated defects is shown to have occurred at the state level, (b) the state determination is not fairly supported by the record, or (c) he can establish by convincing evidence that the factual determination by the state court was erroneous.

Sumner v. Mata, ___U.S.____, 49 U.S.L.W. 4133, 4137 (January 21, 1981) (vacated federal court of appeals decision granting writ of habeas corpus for failure to characterize its analysis of petitioner's challenge under the standards set forth in 28 U.S.C. §2254(d)).

Petitioner's allegation of ineffective assistance of counsel at sentencing comprises an argument that the petitioner was deprived of a full and fair hearing because of his counsel's failure to present all fair hearing because of his counsel's failure to pre-

with only their ultimate decision that assuming all allegations made in his petition are true, no "prejudice" was caused to Washington. Although potentially presuasive, this conclusion is not accorded a statutory presumption of correctness. It is a close question, but I was unable to find from the records before me prior to the hearing that petitioner's allegations raised legal questions only, or that assuming all factual allegations underlying his contention of ineffectiveness were true, that petitioner could not have prevailed as a matter of law. My decision to require an evidentiary hearing was reached with the guidance of the Fifth Circuit's opinion in Spinkellink v. Wainwright, 578 F.2d 582, 590 (5th Cir. 1978). See also Clark v. Blackburn, 619 F.2d 431 (5th Cir. 1980).

II

The following facts were developed during

the evidentiary hearing.

William Tunkey was appointed by the Court to represent petitioner in October of 1976 on the Meli kidnapping and murder case, which was the only one pending at that time. While incarcerated, in the absence of counsel and against Mr. Tunkey's specific advice, petitioner waived his Miranda rights and talked with state authorities ultimately confessing in detail to the murders of two additional persons, as well as three counts of attempted murder and various other unlawful activities occurring during a ten day spree of violence. Mr. Tunkey testified to his feeling of "hopelessness" upon learning of the new murder confessions. His testimony indicated that until that point he had actively pursued pre-trial motions and discovery and even after that date, advised against entry of the guilty pleas and his waiver of a sentencing jury. In preparing for the sentencing hearing, it was Tunkey's testimony that although

he spoke with petitioner's wife and mother, he made no active effort to bring in witnesses to testify on petitioner's behalf regarding his childhood, family ties, or financial problems. When Washington's wife and mother "failed to show" (whether at the sentencing hearing or on previous occasions is unclear), Mr. Tunkey did not seek them out. Tunkey testified that he did talk with petitioner personally about his immediate background, including failure to complete high school, a history of menial jobs and the need to support a wife and child. His testimony, however, indicated that he felt these facts were evident from Washington's statements to the sentencing judge during the plea colloquy. Tunkey testified that his "strategy" was to attempt to convince the judge of Washington's sincerity and frankness in pleading guilty, recognizing Judge Fuller as a judge who had acknowledged his respect for individuals who came before him in the court and admitted

thier guilt. As to his failure to request a presentence investigation, Tunkey testified that although he couldn't say that was a trial strategy, he felt it would possibly be more detrimental than helpful. Based on his conversation with Washington he saw no reason to seek a psychiatric report. Tunkey's testimony indicated that he had no specific memory of seeing a letter from Dr. Jacobson to Judge Tanksley, dated October 8, 1976, regarding a psychiatric evaluation of Washington. He stated that he would like to think that if he had seen it prior to sentencing that he would have asked for an independent psychiatric evaluation.

Attached to Washington's motion for post-conviction relief at the state level were some fourteen affidavits from family members, neighbors and friends, indicating their prior knowledge of petitioner as being a non-violent person who avoided both drugs and alcohol, and who although willing to work was

unable to find a job that would enable him to support his wife and newly born child. The letters are consistent in their support and in their testimony about Washington's feelings of desperation in the period of time surrounding the murders. Also attached were reports by a psychologist and a psychiatrist indicating their opinion that petitioner is and was legally sane, but that his depressed economic and social situation had resulted in a sense of panic and frustration contributing to his rash of violence. These reports, rendered in 1980, although more descriptive of the emotions generated by Washington's background, were not inconsistent with the Jacobson letter of 1976. At the state's request, these affidavits were made a part of the record on this petition and will be considered as setting forth the basis of each witness' testimony on behalf of Washington if called. The petitioner objected to the use of the affidavits in lieu of live testi-

mony, arguing that the affidavits were merely illustrative rather than exhaustive of the character evidence available as support; this objections was overruled.

Judge Richard Fuller, the sentencing judge, now retired, was called on behalf of the State. He testified that even if he had the character witnesses and psychiatric witnesses before him, testifying in conformity with their affidavits, the additional information would not have changed his sentence. According to Fuller, much of the testimony contained in these affidavits had been presented to him by Washington's own testimony. After extensive examination regarding his possible use of the Jacobson report in imposing the death penalty, it was developed that Judge Fuller had no specific recollection of having read or used the report in determining the sentence, but that if the report had been in the Circuit Court file he would have reviewed it prior to sentencing, while if it

had been in the Magistrate's file, he may have seen it although it was not his usual practice to review such files.

Petitioner testified very briefly and his testimony indicated he had no recollection of discussing the Jacobson report with his attorney, Mr. Tunkey, although he could remember other discussions, including Judge Fuller's inquiry during his plea relative to sanity.

Ira S. Loewy, the Assistant State Attorney who handled the State's response to the post conviction motions and second appeal, indicated that he first saw the Jacobson report in the State Attorney's file but that it was not a part of either the Circuit Court file or the record on appeal. He indicated he located the report in the Magistrate's file, which was separate from the Circuit file, for use in the State's response to the post conviction motions as evidence that a psychiatric examination in 1976 would not have

produced significant mitigating evidence.

III.

Washington's petition sets forth five bases upon which he asserts ineffective assistance of counsel during the sentencing:

- (1) failure to obtain or request from the trial court a psychiatric or psychological evaluation of the petitioner to determine whether there were mitigating factors in petitioner's mental state at the time of the crimes;
- (2) failure to investigate readily available witnesses to Mr. Washington's character, background and personal history at the sentencing hearing.
- (3) failure to request a presentence investigation of petitioner;
- (4) failure to present a meaningful closing argument and sentencing memorandum to the judge, and
- (5) failure to secure an independent evaluation of the reports of the medical examiners.

The central issue raised by the allegations is the assertion by petitioner that an adequate independent investigation by trial counsel would have revealed information and

witnesses relevant to circumstances which may have mitigated the death sentences imposed.

The Florida provision for sentencing on capital crimes provides for the weighing of specifically enumerated "aggravating circumstances" against suggested mitigating factors. That the mitigating factors listed in the statute are merely illustrative and not exhaustive is mandated by the Supreme Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978) (Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record or circumstances proffered as a basis for a sentence of less than death). Any ambiguity which may exist because of the language of Section 921.141(6) has been avoided by the Florida Courts' construction of the statutes in this and other cases to permit the sentencing court to consider non-statutory

mitigating factors. Washington v. State, 362 So.2d 658, 667 (Fla. 1978); Spinkellink, supra, at 620. Thus, any failure on the part of counsel to proffer relevant, nonstatutory circumstances in mitigation, cannot be excused or ignored by a restrictive reading of what is admissible under subsection (6).

Under the Fifth Circuit's analysis of the Sixth Amendment right to counsel as applied to the States through the due process clause of the Fourteenth Amendment, "[a] criminal defendant has the right to be represented by counsel, 'reasonably likely to render and rendering reasonably effective assistance.'" Rummel v. Estelle, 590 F.2d 103, 104 (5th Cir. 1979) (per curiam), on remand from 589 F.2d 651 (5th Cir. 1978) (en banc). This responsibility should be directed as "fully to the dispositional phase of the proceedings as to pretrial preparation and courtroom advocacy." United States v. Pinkney, 551 F.2d 1241, 1249 (D.C. Cir. 1976). See also Voyles v. Watkins,

489 F.Supp. 901, 912 (N.D. Mass. 1980), citing Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality opinion) (sentencing is critical stage of proceeding entitling defendant to effective assistance of counsel).

Criteria for the attorney's effective preparation for this critical aspect of a capital case are not easily available in case law; guidelines are suggested, however, in the cases dealing with adequate preparation for trial. For instance, in the trial preparation context, counsel has a duty to interview potential witnesses and to make an independent examination of the facts, circumstances, pleadings and laws involved. Rummel v. Estelle, supra at 104; Clark v. Blackburn, supra at 434; Brown v. Blackburn, 625 F.2d 35, 36 (5th Cir. 1980); Gaines v. Hopper, 575 F.2d 1147, 1149 (5th Cir. 1978); Caroway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). Analogous to this duty would be the responsibility of the attorney representing

a client at sentencing to make an independent search for witnesses with knowledge of the defendant's character, disposition to commit crimes, exenuating circumstances which may have contributed to an isolated incidence of violence, etc. Just as it has been suggested that the fact that trial counsel has correctly performed other tasks required of him, such as cross-examination of witnesses for the prosecution, is not dispositive of the counsel's overall effectiveness at trial, Rummel v. Estelle, supra at 105, so it is reasonable to require counsel to make independent investigation of the mitigating circumstances for sentencing and not to rely merely on the cross examination of witnesses at a sentencing hearing and espousment of defendant's unsupported view of the events.

It is also suggested by petitioner, that counsel failed in his duty to provide a psychiatric or psychological profile of the defendant. The importance of a prior

psychiatric evaluation has often been recognized in the context of a defendant's competence at the time of the offense or as to his ability to stand trial or enter a plea of guilty. Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981), citing United States v. Fessel, 531 F.2d 1275, 1279 (5th Cir. 1976) (the court has "repeatedly stressed" the particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel). Indeed, it has been cautioned that a counsel's proper role in making tactical decisions or choices about the use of psychiatric or other evidence of mental disturbance, "should not be confused with the duty to investigate" the existence of such evidence. Beavers v. Balkcom, supra at 116. However, in the instant case, all indications were that Washington was competent to stand trial; he was able to converse extensively with court and counsel, and medical reports rendered near the

the time of sentencing and during 1980 fully support the conclusion that defendant was within the legal definition of sanity. Investigation in the psychiatric areas would undoubtedly have produced information relevant and medical personnel who examined the petitioner in recent years. It would not, however, have produced the more critical mitigating evidence of "extreme mental or emotional disturbance" or "incapacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law." Fla. Stat. 921.141(6)(b) & (f).

Evaluation of the performance of counsel is complicated where difficulties arise because of counsel's inability to agree with or reconcile the expressed wishes of his client. United States v. Pinkney, 551 F.2d 1241, 1251 n. 60 (D.C. Cir. 1976).^{2/} The instant case clearly demonstrates a similar

^{2/} "We recognize the difficulties that may be confronted by defense counsel in endeavor-

difficulty, for Mr. Tunkey had opposed his client's decision to plead guilty and had urged him to challenge certain issues prior to trial. Where a defendant is guilty of the crimes charges, desires to confess his guilt, and does so in a knowledgable manner, there may be a nature tendency to step aside and let the defendant control the course of proceedings, relying on his direction and initiative for guidance in the information relevant at sentencing. Indeed, it may be suggested that because the defendant did not suggest character witnesses, and appeared to be willing to rest his case on the persuasiveness of his statements of remorse and confession, that counsel is justified in stepping aside and doing no independent

(Footnote 2 continue) ing to reconcile the expressed wishes of his client, however, unworkable, with sound rehabilitative practices. We are also mindful of the difficulty of making a record of the details and nuances of attorney-client discussion. The record must, however, contain enough to afford more assurance of meaningful presentence collaboration than [was] evident here." Id.

investigation. The fallacy of this suggestion, is revealed in an intriguing opinion. Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1979) vacated as moot, 446 U.S. 903 (1980), on remand, vacated, 623 F.2d 366 (5th Cir. 1980). Despite the vacation of the opinion, I note that the Fifth Circuit has itself made reference to the original analysis. See e.g., Brown v. Blackburn, supra at 36 n. 3, Lovett v. Florida, 627 F.2d 706, 710 (5th Cir. 1980). Therefore, despite my concern as to the precedential value of this opinion, I turn to it for guidance. There it was recognized that a defense attorney's initial attempts to verify potentially relevant psychiatric reports on a defendant by telephone, but his determination based on the telephone investigation that available reports would not be helpful to the insanity defense proposed for trial, constituted less than effective assistance of counsel. Nor was this failure mitigated by the defendant's own failure to volunteer

to his attorney information relevant to his mental background. "[E]liciting relevant information from the client is a central part of the defense attorney's task In other words, a defendant's failure to disclose certain information to his attorney is not necessarily, or obviously, or even probably the defendant's fault." Davis v. Alabama, supra at 1219. "We should not hold a defendant responsible for failing to reveal certain information to his attorney unless the attorney has made every reasonable effort to elicit the information, has made his client aware of the sort of information that might be relevant, and has given his client an opportunity to disclose it." Id. at 1220. Although the Davis opinion is potentially distinguishable because of the recognition that a defendant should not be held responsible for volunteering information on his own sanity, I suggest that a similar standard should apply where a defendant validly

desires to confess his guilt on criminal charges and yet may be so preoccupied by the desire to confess moral culpability that he is oblivious to the very factors relevant to mitigation of his legal culpability.

Petitioner contends that counsel's failure to request a presentence investigation report was error. No citations of authority for this proposition have been argued nor can it be suggested that there is a constitutional right to such a report. It is evident from Tunkey's testimony that he was concerned that such a report could also prove detrimental. Nonetheless, in light of the generally supportive affidavits filed in this case, it is evident the report may have provided additional independent information in mitigation of the aggravating circumstances previously shown. Therefore the failure to obtain such a report, must be evaluated in the overall context of counsel's performance.

Petitioner's allegation of ineffective

argument during sentencing also must be evaluated in light of the mitigating circumstances which may have been adduced upon a more complete investigation, and based upon full consideration of the counsel's strategy. Standing alone, it does not constitute or provide persuasive evidence of ineffectiveness since review of the argument reveals that it was both relevant to the facts actually adduced during the plea colloquy and sentencing and was persuasively and artfully stated.

In the instant case we are faced with the allegation of counsel's failure to investigate witnesses who would have shed light on the defendant's difficult childhood, the psychiatric or psychological reactions to his background, the circumstances surrounding his lack of a job, a newly-born child, the desperation for money -- factors which may have had an impact on the sentence. This allegation is supported by review of the affidavits of his family, acquaintances and doctors. The pri-

mary value of such testimony would have been to corroborate Washington's statement of the pressures he felt at the time of the murders, and their observations of his non-violent past.

It is evident that in the instant case, Mr. Tunkey's judgment was affected by the evidence of Washington's guilt and his desire to plead guilty. Mr. Tunkey candidly admitted that once the multiple confessions were given, he had a feeling that nothing could be done to save Washington and that this feeling was behind his failure to do an independent investigation into petitioner's background and potentially mitigating emotional and mental reasons for the killings.

In the final analysis of the facts adduced at the hearing, it is evident that Mr. Tunkey should have made an independent investigation of factors relevant to mitigation, and that such investigation would have produced generally favorable information from family,

friends, former employers, and medical experts. Although it appears that Mr. Tunkey made an error in judgment,^{3/} the law does not require counsel's effectiveness to be judged by hindsight and the Constitution does not guarantee errorless counsel. Lovett v. Florida, supra at 708; Herring v. Estelle, 491 F.2d 125,127 (5th Cir. 1974). It appears that where an allegation of ineffective assistance of counsel is permitted on specific acts or omissions of counsel, such as the failure to investigate potentially mitigating circumstances, the petitioner must make a showing of prejudice before reversal for counsel's ineffectiveness is appropriate. Lovett v. Florida, supra at 510 (and citations therein); Davis v. Alabama, supra at 1221-23; United States v. Decoster (Decoster III), 624 F.2d 196 (D.C. Cir. 1979) (en banc).

^{3/} The fact of Washington's voluntary, detailed confessions to multiple crimes is extremely unusual, and according to the testimony during the hearing, rarely

Counsel for petitioner suggested that the prejudice standard for ineffectiveness is inappropriate, citing the analysis in Davis v. Alabama wherein it is noted that in at least three recent cases the Supreme Court found constitutional violations without inquiring into the potential for prejudice. Id. at 1222, analyzing Geders v. United States, 425 U.S. 80 (1976); Herring v. New York, 422 U.S. 853 (1975), and Holloway v. Arkansas, 435 U.S. 475 (1978). Nonetheless, the Fifth Circuit observed that "[n]ot every variety of attorney ineffectiveness should be treated the same way. If an attorney has not adequately investigated possible defense, it will often, although not always, be appropriate to ask whether a defendant was prejudiced before ordering a new trial." Id.

(Footnote 3 continue) occurs in capital cases. To suggest that Mr. Tunkey failed to make the necessary investigation is not to impugn his general qualifications. By all accounts, he is and was a competent, experienced criminal attorney, who in the Washington case, was faced with a unique, and potentially, overwhelming situation.

I believe a standard which puts the initial burden on the petitioner to demonstrate prejudice or the likelihood that counsel's inaction affected the outcome of the sentence, is appropriate here. See e.g. United State v. Decoster, supra at 208.

In applying the standard to the facts at hand, I find no showing of prejudice. In reaching this determination, I have considered Judge Fuller's testimony that even if he had considered the live testimony of character and psychiatric witnesses, as proposed in the affidavits, he believes he would have imposed the death sentence. However, recognizing the potential weakness of hindsight analysis, I have not treated Judge Fuller's testimony as determinative on the issue of prejudice. Rather, reviewing the proposed character and psychiatric testimony, and weighing it against the detailed record of petitioner's conduct in initiating and carrying out three separate episodes of planned robbery, kidnapping and

murder, there does not appear to be a likelihood, or even a significant possibility that the balancing of aggravating against mitigating circumstances under the Florida death penalty statute would have been altered in petitioner's favor. Critically, the character and medical testimony cannot reasonably be characterized as evidence of extreme mental or emotional disturbance. Nore does it provide persuasive rationalization for petitioner's extended and calculated course of violence. Therefore, it my determination on the critical legal issue, that petitioner was not prejudiced by the inaction which did occur, and was not denied his Constitutional right to effective assistance of counsel, as that standard is defined under present case law.

IV.

During the evidentiary hearing, a question was raised as to whether Judge Fuller considered or utilized the Jacobson psychiatric

report in sentencing Washington.^{4/} The testimony of both petitioner and his counsel indicated the Jacobson report had not been considered or discussed by them in preparing for the sentencing hearing, and Tunkey had no specific recollection of seeing the report, which was in letter form addressed to a magistrate, prior to the sentence. According to petitioner, this raised the potential for a "Gardner" violation. In Gardner v. Florida, 430 U.S. 349 (1977), a death sentence was vacated because of the judge's consideration of a portion of a presentence report, which had not been disclosed to defense counsel prior to sentencing. The finding of a denial of due process was made without consideration of whether the undisclosed portion was prejudicial to the defendant. Id. at 354 n. 5. Petitioner contends this is a newly discovered issue, unexhausted

^{4/} See factual discussion of Jacobson report, beginning at page , supra.

in the petitions raised before the state court, and urges the appropriate action is to permit the state courts the opportunity to consider the issue. The state argues, alternatively, that the issue is "contrived" and factually meritless, or that having heard the relevant testimony this Court is in the better position to reach and address the merits.

The policy of the Fifth Circuit is that "a federal district court must dismiss without prejudice a 'mixed' petition for a writ of habeas corpus filed by a state prisoner." Galtiera v. Wainwright, 582 F.2d 348, 355 (5th Cir. 1978) (en banc.)^{5/} "Considerations of comity, avoidance of piecemeal litigation, economy of judicial energy, and the fullest consideration of a petitioner's claims are best served if all of a petitioner's claims are presented to the state court system at one time." Id. at 356. Mixed petitions are

^{5/} In stating the Fifth Circuit's policy on "mixed petitions," the en banc

those which argue both exhausted and unexhausted issues, and although dismissal of the entire petition without prejudice is normally appropriate, it is not required where the unexhausted claims fall within an exception to the exhaustion doctrine. Id. at 355. "Exceptions to the exhaustion doctrine have been developed judicially to cover situations where mechanical adherence would not further the goals of the exhaustion doctrine or would frustrate an overriding federal concern." Id. at 354. I believe that in the instant case, exhaustion on the

(Footnote 5 continue) opinion noted that the majority of federal circuits allow or even require district courts to consider the exhausted claims in a mixed petition. Id. at 365 n. 16. For instance, absent special circumstances, the Eighth Circuit requires the district court to consider exhausted claims but dismiss the unexhausted claims while the petitioner pursues his remedy in state courts. Tyler v. Swenson, 483 F.2d 611, 614 (8th Cir. 1973); Lindner v. Wyrick, ___ F.2d ___ (8th Cir. Case No. 80-1468, March 24, 1981). After careful consideration of the Fifth Circuit's philosophy in Galtieri, and in light of the unusual posture in which the unexhausted claims has

asserted "Gardner" violation should not be required. First, the Jacobson letter was appended to the State's response to the motion for post conviction relief and both counsel and the state courts have had an opportunity to recognize and require development on this potential issue if desired. Second, the potential for the Gardner issue to exist was not argued until this Court had already begun the taking of testimony on exhausted claims and the determination of whether the issue is factually supportable requires consideration of fairly lengthy testimony adduced before the undersigned which may be difficult for the state court to accomplish on the basis of the bare transcript record. Third, my review of the facts adduced at that hearing leads me to conclude there is little factual merit to the argument thereby offsetting somewhat our tradi-

(Footnote 5 continue) arisen here, the bifurcated treatment used in other circuits does not appear appropriate here.

tional interest in permitting and encouraging state courts to consider potential constitutional issues. Compare Galtieri v. Wainwright, supra at 359-60; Bufalino v. Reno, 613 F.2d 568, 570 (5th Cir. 1980); Willett v. Georgia, 608 F.2d 538 (5th Cir. 1970).

In reviewing the testimony of Judge Fuller, Mr. Tunkey, Mr. Washington and Mr. Loewy, I do not find it reasonable to conclude that Judge Fuller considered the Jacobson report in sentencing petitioner. The original report was addressed to the Magistrate not the Circuit level file. In addition, neither Washington nor Tunkey had any specific recollection of reviewing the report nor does any discussion of the report occur during the plea colloquy or sentencing hearing. Finally, and I believe most importantly, the report did contain information which supported Judge Fuller's specific determination that defendant was not suffering from the influence of extreme mental or emotional disturbance, and

had the capacity to appreciate the criminality of his conduct. See Record on Appeal at 589. It is reasonable to conclude that if Judge Fuller had reviewed the report he would have mentioned it, in much the same manner as he noted other specific evidence which supported his conclusions. Therefore, although it appears that Mr. Tunkey and petitioner were unaware of the Jacobson report, I find that Judge Fuller was equally unaware of the report at the time of sentencing. Based on this finding, no violation of Gardner v. Florida has occurred. Compare Raulerson v. Wainwright, ___F.Supp.___ (M.D. Fla. 1980) (Case No. 79-267-Civ-J-WC). (Determination of Gardner violation depended on factual finding that trial judge did consider a report which petitioner was unaware of at time of sentencing).

V.

In addition to the allegation of ineffectiveness of counsel, petitioner has cited

some fourteen additional deficiencies with the state proceedings or the Florida sentencing statute. These issues have not been fully briefed by the parties, however my independent review of these issues reveals them to be meritless. For instance, petitioner's attack on the statute as improperly restricting consideration of mitigating circumstances is foreclosed by the fact that both the sentencing court and the Florida Supreme Court considered non-statutory mitigating circumstances. See also Spinkellink v. Wainwright, supra at 621. The constitutionality of the Florida sentencing statute has been addressed and resolved adversely to petitioner's contention in Proffitt v. Florida, 428 U.S. 242 (1976). See also Spinkellink, supra. Petitioner's attack on the statute fails to provide new insight requiring more exhaustive consideration by the undersigned.

VI.

Based on the foregoing findings of fact and conclusions of law, the petition for writ of habeas corpus is DENIED. To the extent, it may be applicable, the stay of execution previously issued is continued for forty-eight hours after the issuance of this Order to permit petitioner to file notice of any appeal at the Fifth Circuit. Request for a further stay should be directed to the Fifth Circuit.

A295

DONE AND ORDERED at Miami, Florida, this

_____ day of April, 1981, at 1:30 p.m.

UNITED STATES DISTRICT JUDGE

COPIES FURNISHED:

Richard Shapior, Esq.
Calvin L. Fox, Esq.

SAMPSON ARMSTRONG,
Appellant,

v.

THE STATE OF FLORIDA
Appellee.

SAMPSON ARMSTRONG,
Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary, Florida
Department of Corrections and CHARLES
G. STRICKLAND, JR., Superintendent,
Florida State Prison.

NO.61,871

SUPREME COURT OF FLORIDA

January 20, 1983

(PER CURIAM) Sampson Armstrong appeals the denial of his motion to vacate, set aside or correct his conviction and sentence filed pursuant to Florida Rule of Criminal Procedure 3.850. Armstrong is a prisoner under sentence of death. His convictions and sentences of death were affirmed when he previously appealed them to this Court. Armstrong v. State, 399 So.2d 953 (Fla.1981). Along with his motion, appellant filed motions for an evidentiary hearing, for a continuance, for appointment and payment of experts, and for discovery. The trial court denied all of appellant's motions. We hold that an evidentiary hearing is not required and affirm the denial of relief. Armstrong has also filed a petition for habeas corpus in which he argues that he was not afforded effective assistance

of counsel on his previous appeal of his convictions and sentences, and in which he argues that this Court, in deciding the appeal, fundamentally erred. We find the contentions to be without merit and deny relief.

I. Rule 3.850 Appeal

With regard to his convictions for robbery and two counts of first-degree murder, appellant contends that they should be vacated because the court erred in denying his motion for a change of venue; because the court erred in allowing Ida Jean Shaw to testify and to be called as a court's witness; because the jury was not completely apprised of the treatment Ida Jean Shaw received in exchange for her testimony; because the jury was selected from a sample of citizens from which racial and gender-

based exclusions had been made; because the court erred in failing to sever the trials of appellant and his codefendant Earl Enmund; and because the trial judge deprived appellant of due process by inhibiting defense counsel in his attempt to present an item of exculpatory evidence. All of these legal points either were or could have been presented to this Court in the initial appeal. They were all either waived at trial by the lack of objection, waived on appeal by the lack of argument here, or presented to this Court, considered, and determined. Thus all of these issues are, for one reason or another, completely foreclosed and are not subject to collateral attack. Antone v. State, 410 So.2d 157 (Fla.1982); Goode v. State, 403 So.2d 931 (Fla.1981); Alvord v. State,

396 So.2d 184 (Fla.1981); Adams v. State,
380 So.2d 423 (Fla.1980); Henry v. State,
377 So.2d 692 (Fla.1979).

With regard to his sentence of death, appellant presents numerous arguments questioning its validity. He argues that the sentencing judge considered some improper aggravating circumstances and that, with their exclusion, the sentence of death is rendered improper. He questions whether the sentencing judge found that his age of 23 at the time of the crimes was in fact a mitigating factor rendering the sentence of death improper. He argues that he was denied due process of law when his sentence of death was not accompanied by written findings of fact as required by statute and that the subsequent filing of written findings did not cure the irregularity.

He argues that the trial court, in sentencing him to death, improperly considered and relied upon information other than what was developed at his trial. He argues that the procedure utilized at the sentencing portion of his trial deprived him of due process and provided an inadequate basis for the jury and judge to make their sentencing determinations. He argues that his sentence of death is inappropriate and its imposition is arbitrary and capricious in light of the established facts of the case. He argues that the court committed reversible error in failing to instruct the jury that aggravating circumstances were required to be proven beyond a reasonable doubt.

All of the above-listed contentions either could have been raised

on direct appeal, were argued on appeal and determined, or were considered and determined by this Court on its own motion in discharge of its duty to review death sentences. Therefore, they are not subject to consideration by a Rule 3.850 motion. Thompson v. State, 410 So.2d 500 (Fla.1982); Ford v. State, 407 So.2d 907 (Fla.1981); Smith v. State, 400 So.2d 956 (Fla.1981); Meeks v. State, 382 So.2d 673 (Fla. 1980); Sullivan v. State, 372 So.2d 938 (Fla. 1979).

Appellant contends that the capital felony sentencing law in effect at the time of the trial and the instructions to the jury regarding sentencing improperly limited mitigating considerations to the circumstances listed in the statute in violation of Lockett v.

Ohio, 438 U.S.586 (1978). This issue, like others already mentioned, could have been raised on direct appeal and therefore is not a proper subject for collateral attack of appellant's sentence. Moreover, we find that the statute applied, the jury instructions used, and the judge's deliberations on sentence all comported with the principles of Lockett. The instruction did not have the effect of telling the jurors that they were restricted to consideration of statutory mitigating circumstances. This contention, were it a proper one to consider in this proceeding, would be governed by our decision in Peek v. State, 395 So.2d 492 (Fla.), cert. denied, 451 U.S.964 (1981), in which the same argument was raised. There, we said:

Recurring to the charge given in

this case, we not at the outset that it in no way restricts the jury to a consideration of the statutorily enumerated mitigating circumstances. Indeed, the instruction on mitigating circumstances, when read in conjunction with the express limitation on consideration of aggravating circumstances, advises the jury that the list of statutory mitigating factors is not exhaustive. See Songer v. State, 365 So.2d 696, 700 (Fla.1978) (on rehearing). It strikes a constitutional balance by directing, but not limiting, scrutiny to those areas of mitigation considered vital by the legislature in determining the fairness of a life or death sentence, thereby assuring that the death penalty will be applied in a consistent

and rational manner. Were we to sanction an instruction which established no effective guidance for the jury in considering circumstances which may mitigate against death, we would surely breathe life into Mr. Justice Rehnquist's admonition that such a procedure would "not guide sentencing discretion but [would] totally unleash it." Lockett v. Ohio, 438 U.S. at 631, 98 Sup.Ct. at 2975, 57 L.Ed.2d 973 (Rehnquist, J., concurring in part and dissenting in part).

Contrary to appellant's assertion, the instruction given here is consistent with Lockett v. Ohio. Lockett holds only that a sentencing body must not be precluded from considering, as a mitigating factor,

aspects of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for the sentence less than death. As noted above, our death penalty statute does not limit consideration of mitigating circumstances in Florida's statute direct the jury's attention to many aspects of the defendant's character and the circumstances surrounding the offense. While we do not contend that the statutory mitigating circumstances encompass every element of a defendant's character or culpability, we do maintain that the factors, when coupled with the jury's ability to consider other elements in mitigation, provide a defendant in Florida with every opportunity to prove his or her

entitlement to a sentence less than death.

395 So.2d at 496-97 (footnotes omitted).

Our conclusion that the jury was not restricted in its consideration of mitigating factors is buttressed by the observation that defense witness Betty Fine was permitted to testify on a broad range of matters at the sentencing trial. The witness testified not only to matters relating to statutory mitigating circumstances, but also to matters concerning appellant's background and character. In view of all the matters she was allowed to testify to, there is no support for appellant's present contention that the court's instructions discouraged defense counsel from attempting to present mitigating evidence. Indeed, judging from the scope of defense

counsel's presentation at the sentencing proceeding, it appears that defense counsel correctly interpreted the capital felony sentencing law, which, as we held in Songer v. State, 365 So.2d 696 (Fla. 1978) (on rehearing), cert. denied, 441 U.S. 956 (1979), was not intended to restrict consideration of mitigating factors.

The only contention raised by appellant's motion that is proper for consideration by collateral attack is the argument that he received ineffective assistance of counsel at both the guilt phase and the sentencing phase of his trial. We will therefore proceed to evaluate this claim, using the principles developed in Knight v. State, 394 So.2d 997 (Fla. 1981). We are aware of the different and more elaborate analysis set

forth in Washington v. Strickland, 693 F.2d 1243 (5th Cir.1982), but we believe the Knight test reaches the legally and constitutionally correct result in this case.

In Knight v. State, this Court expanded upon the principles earlier developed in Meeks v. State, 382 So.2d 673 (Fla. 1980), and announced a four-step test for determining whether a defendant has been denied the effective assistance of counsel at his trial. First, the challenger must detail in his pleading the specific omission or overt act upon which the claim of ineffective assistance of counsel is based. Second, the defendant must show that the act or omission was a substantial and serious deficiency measurably below the standard of competent counsel. Third, the defendant must show

that the deficiency, viewed under the circumstances, probably affected the outcome of the proceedings. Finally, the defendant's showing of substantial, prejudicial deficiency must withstand the state's attempt at rebuttal. Such rebuttal may be achieved by showing beyond a reasonable doubt that there was no prejudice in fact. Knight v. State, 394 So.2d at 1001.

With regard to the guilt phase of the trial, appellant lists several instances of failure to impeach witnesses regarding factual inconsistencies, a failure to object to testimony, and a failure to investigate and present evidence of the alibi defense. With regard to each instance, we have no difficulty finding that the asserted deficiencies were matters of trial tactics within the

standard of competence expected of attorneys. Moreover, appellant has made no showing of how the outcome might have been affected by different actions on the part of trial counsel.

With regard to the sentencing phase of his trial, appellant contends that his counsel failed to adequately present evidence of mitigating circumstances. This failure, appellant asserts, is demonstrated by the fact that defense counsel presented only one witness at the sentencing phase, and did not call any members of appellant's family as witnesses. Appellant further asserts that defense counsel failed to submit relevant matters pertaining to his character and background.

Again, we conclude that appellant's arguments are mere attacks upon the

tactical choices of his trial attorney. There is no deficiency shown. The lawyer probably did the best that could be done under the circumstances and in fact presented testimony pertaining to a broad range of both statutory and nonstatutory mitigating circumstances.

The trial court order appealed from recites that the record shows that appellant received legal representation at both the guilt and sentencing phases of his trial that was more than adequate and showed above-average competency. The record conclusively shows that there was no failure to provide reasonably effective assistance of counsel as is constitutionally required.

Appellant also contends that this Court considered information from outside the record in affirming his sentence of

death on appeal. This argument does not relate to anything the trial court did or failed to do or to anything that transpired during the trial or trial-level proceedings. Therefore it is not an appropriate matter to raise in a Rule 3.850 motion. Foster v. State, 400 So.2d 1 (Fla. 1981). However, we will treat this argument as a petition for habeas corpus. We find the argument to be without merit and deny the petition. See Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 102 Sup.Ct. 541 (1981).

II. Habeas Corpus.

As was stated above, appellant has also filed a petition for a writ of habeas corpus with this Court, in which he challenges this Court's treatment of this prior direct appeal and argues that he was deprived of the effective assistance of counsel in presenting the appeal.

Petitioner contends that this Court committed fundamental error in deciding his appeal and deprived him of due process of law. He argues that the Court erred in affirming his sentence of death after finding that two of the three statutory aggravating circumstances found by the trial judge were erroneous. Our holding was that the erroneous findings in aggravation did not impair the process of weighing the aggravating circumstances against the mitigating circumstances because there

were no mitigating circumstances to weigh. Armstrong v. State, 399 So.2d at 963. In view of the fact that the jury recommended death, we held that the single valid aggravating circumstance was a sufficient basis to support affirmance of the sentence of death.

Petitioner argues that our affirmance on this basis was improper since an appellate court cannot know what the sentencing judge would have decided had he known that part of the basis for his decision was invalid. Once this Court had decided that two of the three aggravating circumstances recited by the trial judge were inapplicable, petitioner argues, the proper result was to then remand for resentencing. In support of this position petitioner cites Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446

(5th Cir. 1981), remanded, 103 Sup.Ct.1856 (1982), and Henry v. Wainwright, 661 F.2d 56 (5th Cir.1981), vacated on other grounds and remanded, 102 Sup.Ct.2922, judgment reinstated, 686 F.2d 311 (5th Cir.1982). However, we find the cited cases to be distinguishable and therefore not controlling. Ford v. Strickland, No.81-6200 (11th Cir.Jan.7, 1983). We therefore find this point to be without merit.

Petitioner also contends that he received ineffective assistance of appellate counsel and that because of his appellate lawyer's failings, he was deprived of a full and meaningful appeal of his convictions and sentences. He argues that he should be granted a new or belated appeal. Petitioner presents fifteen points and argues that each constitutes a specific omission, substantially deficient

measurable below the standard of competent counsel, and that each had prejudicial impact on the outcome of the appeal.¹

We have examined each of the asserted omissions and have found that each of them either (1) is not a specific

¹ The fifteen specific omissions raised by petitioner are:

(a) The failure to appeal the trial court's denial of the motion for change of venue due to prejudicial pretrial publicity;

(b) The failure to appeal the trial court's denial of the motion for severance of the trial from the trial of codefendant Earl Edmund;

(c) The failure to adequately argue that the evidence of guilt was insufficient or weak;

(d) The failure to raise the issue of inadequacy of trial counsel at the guilt phase of the trial;

(e) The failure to argue the issue of discriminatory methods of selection of the jury venire;

(f) The failure to raise the issue of inadequacy of trial counsel at the sentencing phase of the trial;

(g) The failure to argue that the capital felony sentencing statute improperly restricted the consideration of mitigating circumstances;

(h) The failure to invoke the supplemental authority of Lockett v. Ohio, 438 U.S.586 (1978), during the pendency of the appeal;

(i) The failure to challenge the trial court's findings of aggravating circumstances and to argue concerning the consequences of a holding of invalidity of aggravating circumstances;

(j) The failure to invoke the supplemental authority of Stephens v. Zant, 631 F.2d 397 (5th Cir.1980), during the pendency of the appeal;

(k) The failure to argue that petitioner's single conviction of unarmed breaking and entering of an unoccupied business establishment did not negate the statutory mitigating factor of lack of significant previous criminal history;

(l) The failure to appeal the trial court's omission of an instruction that aggravating circumstances must be proved beyond a reasonable doubt;

(m) The failure to argue that the sentencing proceeding was unfair;

(n) The failure to petition the United States Supreme Court for certiorari to review the affirmance of the convictions and sentences;

(o) The failure to adequately argue that the jury was not fully informed of the agreement between the state and the witness Ida Jean Shaw.

overt act or omission; (2) is not a substantial and serious deficiency measurable below the standard expected of competent

counsel; or (3) is not shown to have been so substantial as to be likely to have affected the outcome of the appeal. See *Knight v. State*, 394 So.2d 997 (Fla.1981). We are satisfied that petitioner received a full, fair, and meaningful appeal. We therefore rule that petitioner is not entitled to relief from his convictions or sentences by habeas corpus.

With regard to the appeal of the denial of the Rule 3.850 motion, we hold that the motion, files, and records in the case conclusively show that the appellant is entitled to no relief. We therefore affirm the trial court's denial of appellant's motions. With regard to the petition for habeas corpus, we hold that petitioner is entitled to no relief and deny the motion.

It is so ordered, (Alderman, C.J.,

Adkins, Boyd and Overton, JJ., Concur.
McDonald, J., Dissents with an opinion,
with which Erlich, J., Concurs.)

McDONALD, J., dissenting: The record in this case clearly demonstrates that the trial judge limited the jury's consideration of mitigating circumstances to those listed in section 941.121 (6), Florida Statutes, and, presumptively, limited his own consideration when he imposed sentence. The judge told the jury to consider mitigating circumstances "as hereinafter enumerated." The only ones enumerated were those listed in the statute.

Sadly, we failed to note this in our review of this record on appeal, and this defect was not called to our attention until this 3.850 appeal was filed. The error here was an unintentional misinterpretation of section 921.141, Florida

Statutes, by the judge and all counsel associated with the case.

This case represents an example of the extreme care that must be exercised in death cases. The death penalty statute enacted by the legislature is an expression of the public policy of this state as the appropriate punishment in certain circumstances. We have held it constitutional on numerous occasions. The decision to impose death or life is guided by the mandatory finding of at least one aggravating factor as defined by the statute. Against the aggravating factors found beyond a reasonable doubt, mitigating circumstances as defined by statute and other evidence which assists the jury to determine the character of the offender are weighed so that the jury members in recommending and the judge in

imposing have had their discretion carefully guided. Judges and juries must not be precluded from considering nonstatutory mitigating circumstances. Lockett v. Ohio, 438 U.S.586(1978). The legislature defined certain factors to be considered in mitigation. That legislative list of mitigating circumstances is neither exclusive nor all inclusive. In Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S.956 (1979), we emphasized that it has always been proper under the Florida statute to consider nonstatutory mitigating circumstances. We must be true to that holding and be sure in all cases that the jury was not precluded from so considering them.

The United States Supreme Court recently reaffirmed the importance of a judge and jury's consideration of all

factors regarding a defendant and his commission of the crime before imposing the death sentence. Eddings v. Oklahoma, 102 Sup.Ct.869 (1982). Florida's death penalty can be constitutionally applied, but to do so we must be alert to those cases where the full complement of due process rights has been impinged upon. This is such a case as it relates to the sentencing. There was no ineffective assistance of counsel in this case, but a lack of due process in the sentencing phase. There is no basis to again review the conviction, but the sentence must be vacated and a new sentencing procedure, including a new advisory jury, must be conducted.

(Ehrlich, J., Concurr.)

* The preliminary jury charge in the sentencing proceeding is, in part, as follows:

[I]t is now your duty and responsibility to determine by a majority vote whether or not you advise the imposition of the death penalty based upon, one, whether sufficient aggravating circumstances as hereafter enumerated exist to justify the death penalty; two, whether sufficient mitigating circumstances exist as hereafter enumerated which outweigh the aggravating circumstances found to exist (Emphasis supplied.)

The trial judge later told the jury:

Now, you will have two forms of verdict as to each count and as to each Defendant. There are two counts of first degree murder. Your advisory sentence as to Count One, and this will be the one as it relates to Earl Edmund: We, the Jury, have heard evidence under the sentencing procedure in the above cause as to whether aggravating circumstances which were so defined in the Court's charge existed in the capital offense here involved and whether sufficient mitigating circumstances defined by the Court's charge do outweigh such aggravating circumstances, and we do find and advise that the aggravating circumstances, do outweigh the mitigating circumstances. A majority of at least seven of us, therefore, advise the Court that the death penalty should be imposed herein upon the Defendant by the Court as to Count One.
(Emphasis supplied.)

* * *

NO. 82-1554
IN THE

October Term, 1982

CHARLES E. STRICKLAND,
Superintendent
Florida State Prison;
JIM SMITH, Attorney General
of Florida, and LOUIE L. WAINWRIGHT
Secretary, Florida Department
of Corrections,

Petitioners,

vs.

DAVID LEROY WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari
to the United States
Court of Appeals for the
Former Fifth Circuit (Unit B)

JOINT APPENDIX

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Petition Filed: March 18, 1983
Petition Granted: June 6, 1983

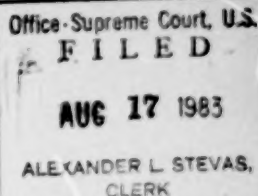


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CHRONOLOGICAL LIST OF RELEVANT DOCKET
ENTRIES

October 1, 1976-Confession to Meli murder.

October 7, 1976-Indictment for First Degree Murder (Meli).

October 7, 1976-Appointment of counsel (Meli).

November 5, 1976-Confession to Birk and Pridgen murders.

November 17, 1976-Indictments for First Degree Murder (Birk and Pridgen).

November 22, 1976-Reappointment of counsel (Birk and Pridgen).

December 1, 1976-Withdrawal of not guilty plea.

December 6, 1976-Sentencing Proceeding.

December 15, 1976-State Court findings in Support of Death/Penalty.

September 7, 1978-Florida Supreme Court affirms death sentences.

April 30, 1979-U.S. Supreme Court denies certiorari.

March 13, 1981-Death Warrant signed.

March 7, 1981-State trial Court denies Motion for Collateral Relief.

CHRONOLOGICAL LIST OF RELEVANT DOCKET
ENTRIES (continued)

April 3, 1981-Petition for Habeas Corpus
filed.

April 6, 1981-Florida Supreme Court af-
firms State trial Court order.

April 7, 1981-U.S. District Court Order
Granting Stay of Execution.

April 10, 1981-U.S. District Court Eviden-
tiary Hearing on Habeas Petition.

April 15, 1981-U.S. District Court Order
denying Habeas Petition.

May 6, 1981-U.S. Supreme Court denies
Motion to Vacate Stay by Eleventh
Circuit.

April 23, 1982-Eleventh Circuit Panel
opinion reverses U.S. District Court.

May 14, 1982-Eleventh Circuit sua sponte
grants rehearing en banc.

June 15, 1982-Oral Argument Eleventh Cir.
cuit, en banc.

December 23, 1982-Eleventh Circuit en banc
reverses U.S. District Court.

March 18, 1983-Petition for Certiorari
filed.

June 6, 1983-Petition granted.

[EXHIBITS]

1

METROPOLITAN DADE COUNTY • FLORIDA

1700 N.W. 10th Avenue
Miami, Florida
33136

JACKSON MEMORIAL
HOSPITAL
Forensic Service-
The Institute

October 8, 1976

The Honorable John Tanksley
County Court
Magistrate Division
1351 N.W. 12th Street
Miami, Florida 33125

RE: WASHINGTON, David
26 year old Black Male
#76-25768 - 70

Dear Judge Tanksley:

The above-named individual was seen for psychiatric evaluation at the Dade County Jail on October 7, 1976 in accordance with the court order signed by Judge Herbert M. Klein on October 2, 1976 in connection with the charges of first degree murder; kidnap for ransom; armed robbery; bench warrant-driver's license.

Prior to seeing the defendant I had occasion to read a copy of the defendant's statement which was apparently obtained on Friday, October 1, 1976 by members of the Metropolitan Public Safety Department. This statement was furnished to me by Mr. Adorno, Assistant State Attorney. I advised the defendant prior to the interview that I had read the statement and

was aware of many of the apparent facts of the alleged offense. The defendant did not seem to be upset with this and was reasonably cooperative during the interview. The defendant related to me how he had managed to contact the victim through an ad in the newspaper and arranged to have the victim meet him at a shopping center. He further explained how he convinced the victim to drive him to his house and to come into the house with him so that he could give the victim the money for the car. The defendant, however, did not corroborate what he had apparently said during the statement given to the Public Safety Department officer regarding the assistance he received from two other individuals, his half-brother and a friend. He told me that they were not present when the victim was tied up and that they took no part in the alleged offense. He stated that they had no knowledge that he was holding the victim and that they did not participate in any way. The only contradiction between what he told me and what he revealed in the statement to the Public Safety Department officers was in relationship to the involvement of his step-brother, Winkie, and his friend, Mills. The defendant further related to me that he found it necessary to stab the victim when the victim attempted to escape. This occurred after the defendant had cashed the check for approximately \$2,600.00 and before he went to pick up money that was to be paid for the ransom of the victim.

During the interview the defendant was

generally comfortable and related information in a cohesive and goal-directed manner. He did not show any bizarre or unusual ideation. There was no evidence of delusional thinking and he did not acknowledge any auditory, visual or tactile hallucinations. He also denied the use of drugs, such as heroin, cocaine or sedatives. He further denied the use of alcohol prior to, at the time of or after the alleged offense. He also denied any problem with them in the past. The defendant stated that he had become involved in the alleged offenses because of his desire to obtain money. He states that he was unable to obtain work and that he was becoming quite desperate. He related that he had been living at his stepfather's house with his half-brother Winkie. His half-brother and the defendant have the same mother. He notes that his stepfather often was not at home and stated that the same was true with his half-brother. He states this is the reason he was able to keep the victim tied up at his stepfather's house without his half-brother, his stepfather or his friends having knowledge of it.

The defendant is the oldest of eight children. Most of his siblings have different fathers, but all share the same mother. His mother is employed currently at Mt. Sinai as a dietitian. He states that he sees her fairly often and has no problems in his relationship with her, although she does urge him to find a job. The defendant last worked regularly in about 1974 after holding a job at a local warehouse.

He apparently held the job for about three years. He did work briefly a year ago. He states that he has only a tenth grade education and does not possess good skills in this area. However, he feels that he is intelligent and not suffering from any mental or emotional disturbance.

The defendant's mood during the interview was not one of depression or elation. His anxiety level was not high. His affect does not appear to be inappropriate. Testing of special faculties revealed that he was oriented to the day, month and year. His fund of general information was generally adequate and he commented about recent events in the news. He was able to recall the last four presidents. He did not do well on mathematical calculations. He was able to multiply 5×5 correctly and to add $7+6$ correctly. He could not subtract $15-8$ correctly, but only after it was put in terms of, how much money do you have if you have five quarters? He corrected stated \$1.25. Tests of abstract reasoning did not show any impairment and his response in this area was generally adequate.

Clinically the defendant showed no evidence of any psychosis at the time of the interview and there was nothing from his description of the events surrounding the alleged offenses which would indicate that he was suffering from any major mental illness at that time. The discrepancy of his statements given to me and the statements given to the members of the Public Safety Department are asen as being due to his

conscious desire to exclude the other two individuals from his involvement at this time, or to include as involved at the time of the statement to the Public Safety Department officers. It is not as important from a psychiatric stand point as to what the defendant says, but rather the manner in which he states it.

The defendant did relate to me that he had given himself up. He related that he was aware that the police were watching the house, but he was able to leave the house by blending in with some school children who were passing by early in the morning. He spoke about how he had called another brother and asked him to drive by the house to see what was happening. After his other brother did this, he contacted the brother. The defendant states he was concerned that something would happen to his half-brother Winkie, and for this reason he gave himself up. He seemed to want to make the point that his half-brother was not involved in the alleged offense.

It is my opinion that presently the defendant is able to assist counsel in his defense and understand the nature of the charges against him. It is felt that the defendant possesses both a rational and factual understanding of the charges. It is further felt that the defendant at the time of the alleged offense had the substantial capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law.

Signed: Sanford Jacobson, M.D.

DECLARATION (EXHIBIT 17)

I, George W. Barnard, hereby declare under pain and penalty of perjury:

1. I am a psychiatrist who was requested by Richard Shapiro, the attorney for David Washington, to interview Mr. Washington. My resume is attached to this Declaration.

2. On May 10, 1980, I interviewed David Washington at the Florida State Prison. During this interview, David expressed that he had a guilty conscience about the murders and often wakes up crying. I detected remorse in David and observed that he seemed to feel very badly over what had happened.

3. David described to me that his parents were separated when he was two years old. He was raised with his mother and his grandmother and was sent back and

forth between them. As he was growing up, he got along with his mother, but he was beaten very badly by his stepfather, and he still has scars on his back from where the stepfather had beaten him with an ironing cord. He also told me that the stepfather beat one sister so badly that she ended up in the hospital, and his stepfather had intercourse with another sister.

4. On psychiatric examination, there was no indication of psychosis.

5. It is my medical opinion that, at the time these capital felonies were committed, while Mr. Washington was not under the influence of extreme mental or emotional disturbance, he was chronically frustrated and depressed because of his economic dilemma wherein he was unable to find employment and provide for his wife and children.

6. It is postulated that his childhood of emotional deprivation, severe physical abuse and extreme violent actions towards him laid the groundwork for the resentment and rage which was triggered by factors in his adult life over which he felt he had no control, and his rage was displaced onto individual's who happened to be present at the time and not directed to persons who had directly caused him suffering. In effect, he had been conditioned by the extreme degree of cruelty and violence to which he had been subjected as a child to act in a violent mode when faced with circumstances over which he had no control in his adult life.

7. Since he has been in prison, he has gained some understanding of himself and realizes that at the time of the crimes there could have been other

alternatives or options to choose; however, because of his upbringing, he did not think or feel at that time, but instead acted on impulse.

8. Since he has been in prison he has lost his bitterness and has found some positive things for himself in that he now can feel and can think things out rather than merely acting on impulses. When I interviewed him, I did not perceive any of the well of frustration or rage in him.

DATE: September 4, 1980

GEORGE W. BARNARD, M.D.

DECLARATION (EXHIBIT 16)

I, David Lane, do hereby declare under penalty of perjury:

1. I am a psychologist who was requested by Richard Shapiro, the attorney for David Washington, to interview Mr. Washington. My resume is attached to this Declaration.

2. On March 19, 1980, I interviewed Mr. Washington at length at Florida State Prison and administered some psychological tests to Mr. Washington.

3. David Washington's behavior throughout our time together was polite, courteous and fully cooperative. He did weep a few times when he was talking about his crimes or his wasted life.

4. David Washington advised me that his childhood was characterized by frequent moving and by periodic shifts between

the home of his grandparents and the home of his mother and step-father. His grandparents fought a great deal, and on occasions his grandfather would get drunk and beat up his grandmother.

5. He described his life with his step-father and mother in even more bleak and frightening terms than life with his grandparents. He told me that his step-father used to line up whichever children he had decided to punish and beat them with an extension cord or other strap for extremely long periods. David's earliest memory is of his step-father beating him.

6. I administered four subtests of the Wechsler Adult Intelligence Scale to obtain an estimate of David's current intellectual functioning. I obtained an estimated Verbal Intelligence Quotient

of 88, which is in the low average range, at about the twenty-first percentile for the general population.

7. I also gave David several cards from the Thematic Apperception Test. This test consists of ambiguous drawings of people in various relationships and activities. The themes which emerged from his responses may be summarized as follows:

(a) self-pity: for being a have-not; for never having had anyone who cared enough for him to push him, guide him, explain things to him; for having been beaten and abused, especially by his step-father;

(b) remorse and self-condemnation: for his crimes; and

(c) despair.

8. I also administered the Rotter Incomplete Sentence Test to David. The themes which emerged from my analysis of David's sentence completions may be summarized as follows:

- (a) regret, shame and remorse;
- (b) self-pity: a feeling that people didn't care about him; and
- (c) pride: in recent accomplishments in learning and in self-discovery.

9. From my observations, it is my opinion that David is not a psychopathic personality. I believe he had and does have a conscience. However, his capacity for sympathy and empathy, for deeply caring about others, seems to be severely limited. He seems to have grown up with a view of himself as bad and unloved (and therefore unlovable). I do not believe he was aware of this view of himself on a clear, conscious level. I believe that this view of himself developed, in part, as a reaction to the childhood experiences of being shunted back and forth from grandparents to mother-and-step-father, with the probable feeling of being unwanted in either home, and of being beaten and of

having extremely meager communication with adults. Early in life, I believe, he learned to see himself as evil, unwanted, unlovable. And he acted in accordance with this self-concept. Children who are deeply troubled and feel unloved often act out in apparently wanton destructive behavior.

10. I don't believe that there is any evidence to support the view that David was legally insane or, psychiatrically speaking, insane at the time of the crimes. He was evidently experiencing his life as extreme and unbearable pressure, because of his poor family and economic situation. He was feeling panicky and was wholly incapable of handling major adult responsibilities. His reaction to this stress was to act in a highly panicked and frenzied state at this stage in his life.

11. As best as I can judge from my interview, David was experiencing a high level of anxiety and a sense of incompetence and frustration at the time the crimes were committed. Those feelings seem to have been so intense that he was unable to think of any sensible solutions to his problems. This is a result of the fact that as a child he never had any examples provided to him or role-models of good problem solving approaches to life.

12. I feel that David's deep-seated view of himself as evil and his repressed powerful urge to revenge himself for his mistreatment as a child finally erupted into mindlessly brutal destruction of lives. I hypothesize that in some unconscious way he saw his victims as stand-ins for all those who had hurt him in the past.

13. I don't believe that David got any pleasure out of the crimes on any level of awareness except perhaps for some vague sense of relief of frustration. Emotionally, he seems to have been numb throughout those twelve days, operating in a kind of trancelike phase, and only coming to an awareness of what he was doing when he suddenly realized he was killing Frank Meli.

14. In my opinion, during this period David was so wrapped up in immediate survival needs and his overwhelming responsibilities that he was immobilized with a sense of inadequacy to cope with his problems.

15. David did not give me the impression of being a cynical, sardonic, cold-blooded killer, but was more like an ashamed, confused and remorseful child.

DATE: September
4, 1980

DAVID LANE, PH.D.

IN THE CIRCUIT
COURT OF THE
ELEVENTH JUDICIAL
CIRCUIT IN AND
FOR DADE COUNTY,
FLORIDA

CRIMINAL DIVISION

THE STATE OF FLORIDA,)

Plaintiff,)

vs.) CASE NOS. 76-8300

DAVID LEROY WASHINGTON,) 76-9542

Defendant.) 76-9543

76-8646

Metropolitan
Justice Building,
Miami, Florida,
Wednesday, 9:00
a.m., December 1,
1976.

The above-entitled cause came on for
plea before The Honorable Richard S. Ful-
ler, Circuit Judge, pursuant to Notice.

- - -

APPEARANCES:

RICHARD E. GERSTEIN, State At-
torney, by HENRY ADORNO, Assis-
tant State Attorney,

PHILLIP A HUBBART, Public Defender, by WILLIAM TUNKEY, Specially Appointed Public Defender
Attorney Defendant.

- - -

MR. ADORNO: We are here on 76-8300.
State of Florida versus David LeRoy Washington; 76-9542, also against David LeRoy Washington; 76-9543, State of Florida against David LeRoy Washington; and 76-8446. It is the State's understanding that Mr. Washington is going to withdraw previously entered plea of guilty as charged to the indictment in all four cases with the exception that 76-8646 he would be only entering a plea to Count 2, battery on a law enforcement officer. If the Court accepts the plea, the Court would abandon Count 1, attempted escape.

THE COURT: Mr. Tunkey.

MR. TUNKEY: Judge, if I may make several announcements.

The defendant is before the Court charged in an indictment as Mr. Adorno said in three separate cases starting with 76-8300 where the defendant is charged along with Nathaniel Taylor and Johnny Gary Mills with first degree murder, kidnapping, ransom, robbery, conspiracy to commit robbery.

The defendant at this time will change his previously entered pleas of not guilty to those counts and enter a plea of guilty to the Court.

As to 76-8542 wherein the defendant is charged in an indictment with six counts, the defendant will change his previously entered pleas of not guilty as to those six counts and tender pleas of guilty to the Court.

As 76-9543 wherein the defendant is charged by indictment with two counts, first degree murder and robbery, the

defendant is going to change his previously entered pleas of not guilty and tender a plea of guilty to the Court.

As to 76-8646 wherein the defendant is charged in Count 2 with battery on a law enforcement officer in which he previously entered pleas of not guilty, he will now enter a plea of guilty to the Court.

There are no negotiations as to what sentence the Court may impose. The only negotiation--the only agreement is, number one, the defendant is waiving, obviously, trial by jury; also, as to any penalty phase on 76-9543, 76-9542 and 76-8300. That is with the agreement and acceptance of the State of Florida. Of course, as to 76-8646 no waiver is necessary. This is a non-capital offence and a plea of guilty is being tendered.

The defendant and I have discussed these proceedings on numerous occasions both here in the courthouse and in the jury room, and on numerous occasions at Dade county Jail. I would like to put on the record that initially I was appointed to represent Mr. Washington with respect to Case No. 76-8300 by the Court there having been declared a conflict by the office of the Public Defender.

The Court appointed me to represent Mr. Washington with respect to that case, alone. I subsequently had numerous conversations with Mr. Washington with respect to 76-8300 and, again, diligently prepared in that matter for trial.

Subsequent to my appointment on that case, and, also, thereafter on 76-8646, the defendant was advised by me on another two and perhaps three occasions that with

respect to any purpose, whether it be for a court order or any other reason, that if anybody wished to speak with him, that he was not to speak. He was not to write anything to anybody absent my presence. I even gave that to him in written form.

The defendant, however, chose when he was confronted with the allegations presently contained in 76-9543 and 76-9542 to speak with agents of the State of Florida, to wit: sheriff's officers or sheriff's deputies of the Dade County Public Safety Department.

I have seen the written statements which he has given with respect to his culpability in those two matters. I have examined carefully the waiver of rights executed by Mr. Washington which in each case went so far even as to ask Mr. Washington if he desired to have me present

at that time, the police officers acknowledging to him that they were aware that he had counsel; also as to 76-8300 acknowledging to him that they knew who his counsel was. In subsequent conversations with Mr. Washington there was a waiver of the presence of counsel and, more specifically, of myself.

I have filed in each of the indictments as to each of the indictments motions to suppress which I have joined two motions to motions to suppress physical evidence. I have filed in behalf of Mr. Washington motions to suppress the statements, admissions, and confessions.

However, it is my considered judgment that there was a free and voluntary waiver of counsel in each case. There was a waiver of his various constitutional rights to remain silent, to the assistance of counsel, et cetera. I have discussed

this with Mr. Washington. I believe he agrees with me.

The defendant in effect has-- and I am not coming down on David Washington because I believe he has stepped forward and admitted his culpability and he has admitted that he has assented for lack of a better word--I am simply trying to tell the Court that but for the defendant's statements to the police officers in 76-9542 and 76-9543, my advice to the defendant in all probability would have been that we should go to trial.

In my estimation he has both expressly and tacitly overridden my advice. When I say tacitly, I mean by the fact that he went forward and gave full confessions or admissions to 76-9542 and 76-9543; and expressly in a sense that we have discussed this plea today on numerous occasions. It is Mr. Washington's desire

not to contest the charges.

He has, in my estimation, never contested the charges from the initial onset of these proceedings. I would like to--and perhaps this is not the appropriate time to--point out to the Court that Mr. Washington surrendered to the police in 7608300. He cooperated with the police and I am sure this will be brought out in any hearing prior to sentencing.

I do not know and I want to tell the Court that Mr. Washington has expressed to me a desire to testify first of all, obviously, on his own behalf with respect to any sentencing. Number two, he has expressed to me a desire to testify wherever or whenever with respect to any of the allegations contained in 76-9542 or 76-9543.

THE COURT: Does the State want to put in the record any factual basis on

each of the indictments?

MR. ADORNO: Yes, Your Honor, I would.

Judge, I have already had these marked for identification. Copies have already been submitted to Mr. Tunkey.

I am taking these by time as they occurred. The first one would be 76-9543 marked as State's Exhibit on the plea No. 4. It is a statement taken by Detective Majors of the Public Safety Department of the defendant, David LeRoy Washington. I would like to show a copy of the original statement to the defense counsel and to the defendant and I would like to inquire of the defendant if, in fact, that statement was given by him to Detective Majors and if it was freely and voluntarily given.

MR. TUNKEY: I think that would be premature.

THE COURT: Hold a second. Go ahead and swear the defendant.

[Thereupon, the defendant was sworn.]

THE COURT: I think it might be appropriate if first of all you give us a very brief factual basis of that charge and, then, we will ask Mr. Washington to verify that this is the statement he gave.

MR. TUNKEY: Judge, I do not object to the procedure of utilizing the statements of Mr. Washington to support the pleas being entered at this time.

I think that Mr. Washington should be voir dired by the Court prior to any questioning concerning his statements. I am sure once that has been accomplished we can then ask Mr. Washington whether he has had a chance to review these statements.

THE COURT: I want to hear a factual

basis first. I will chat with Mr. Washington concerning his participation after that.

MR. ADORNO: In 76-9543, the count of first degree murder and robbery, the defendant on September 20, 1976, agreed with another Negro male---

THE COURT: He cannot--I am going to ask him questions about this, Mr. Tunkey. You may chat as much as you want to. Do you want to talk with him a minute?

MR. TUNKEY: No.

MR. ADORNO: On September 20, 1976, the defendant, David LeRoy Washington, along with another Negro male who has not been indicted or arrested on this charge conspired to rob a Reverend Dan Pridgen. This individual met with David LeRoy Washington at his house. Based upon this agreement the other Negro male came in contact with Daniel Pridgen and

made an agreement to go to the victim's home which was located at 2773 Northwest 57th Street, Apartment No. 8, Miami, Florida.

Based upon the agreement the other Negro male gained entry into the house of the victim. They were about to engage in a homosexual act. At that time the victim had already undressed and the other individual was about to undress.

At that time the defendant, David LeRoy Washington, entered the home and proceeded to stab the Reverend Pridgen to death. After Reverend Pridgen was killed they ransacked the home and both individuals took a small amount of cash, some jewelry, a .22 caliber pistol, and the victim's automobile.

The .22 caliber pistol was subsequently recovered by the police when

they investigated the Meli homicide. That pistol will also be shown to have been used in the second homicide of Katrini Birk.

The statement I have shown Mr. Tunkey is the statement given by Mr. Washington, basically, relating the facts I have just repeated to the Court. It was taken at 4:10 p.m. at the homicide office in the presence of Detective Chuck Majors and Detective Dave Simmons.

I would ask the defendant at this time whether he recognizes that as being a copy of the confession he gave and as to whether he, in fact, gave that statement and whether it truly and accurately depicts his participation in that homicide.

MR. TUNKEY: I think it is still premature and I reserve that question.

THE COURT: I think he can answer

that question. It will either be satisfactory to the Court that he is here freely and voluntarily or not.

MR. TUNKEY: Based on the Court's ruling, David, do you see before you the copy of the 14-page statement?

THE DEFENDANT: Yes.

MR. TUNKEY: Do you recognize the signature on the last page?

THE DEFENDANT: Yes.

MR. TUNKEY: Is it yours?

THE DEFENDANT: Yes.

MR. ADORNO: Did you give that statement?

THE DEFENDANT: That is duplicate, yes. I gave that statement.

MR. ADORNO: Did you give it freely and voluntarily to Detective Majors and Detective Simmons?

THE DEFENDANT: Yes. I did.

MR. ADORNO: Do you recognize Detective Simmons seated over there?

THE DEFENDANT: Yes. I do.

MR. ADORNO: Did he at any time promise you anything or coerce you to give the particular statement?

THE DEFENDANT: No. He didn't.

MR. ADORNO: Does the statement under oath truly state the actions you took part in the killing of Daniel Pridgen?

THE DEFENDANT: Yes. It does.

MR. ADORNO: I move it into evidence for the purposes of the plea.

THE COURT: It will be received for the purposes of the plea.

[Thereupon, the statement referred to was marked as State's Exhibit No. 4.]

MR. ADORNO: In 76-9542, The State of Florida versus David LeRoy Washington, the defendant is charged in Count I with first

degree murder and in Counts II, III, IV attempted first degree murder; Count V is robbery; VI is breaking and entering a dwelling and assaulting a person lawfully therein.

Judge, the particular homicide took place three days after the Pridgen homicide. On September 23, 1976 in the evening hours approximately the time that the Carter/Ford debates were taking place, the defendant went to the home of Katrina A. Birk, 10351 Northwest 28th Avenue, Miami, Florida, the defendant knowing Katrina Birk on previous occasions, the defendant having gone over to Katrina Birk's husband's establishment to sell furniture there and selling some used property to her husband.

He waited outside until an appropriate moment. Then, he broke into the house. Inside the house were Katrina

Birk and three sisters who are Ruth Pitzer, Julia Sullivan, and Georgia Griffith.

These three individuals were down from Indiana visiting Mrs. Birk while her husband was in the hospital convalescing from an injury.

The defendant tied up all four of the females in the house. Their ages range from age 64-73. He was able to obtain from Mrs. Birk a tin can that contained a small amount of cash. That tin can was subsequently found by the police when Mr. Washington took the police out and they were able to obtain it.

After obtaining this particular amount of money the defendant then proceeded to stab and shoot all four of the female occupants in the house. As a result of the stabbing, not the bullet wound, Mrs. Birk died.

Mrs. Griffith is in a coma as a

result of the stabbing and shooting and is presently under hospitalization in Indiana.

Mrs. Pitzer and Mrs. Julia Sullivan have recovered from those particular wounds and are now again living in their home town in the middle part of Indiana.

The defendant fled the house and subsequently confessed to that particular case.

I would like to show the defendant what is marked as State's Exhibit on plea No. 3 and ask him whether he remembers giving that particular statement to Detective Dave Simmons of the Public Safety Department.

THE DEFENDANT: May I be allowed to speak, Judge?

THE COURT: Yes, of course.

THE DEFENDANT: On this case I am going to plead guilty, you understand what I'm saying. I'm going to plead

guilty. I did, so I will. I taken a person's life. I did take it when I went into that house.

What I'm saying, my intentions was to tie these people up. I wouldn't have cut the cord to the phone if I was intending to harm them. I wouldn't have tied them up and gagged them.

After I got into the house-- when you are committing a robbery anything can go wrong. It didn't go like--I thought Mrs. Birk had something in her hand and I started shooting up the place.

I'm guilty on the charge.

THE COURT: Thank you for your statement.

MR. ADORNO: Is that the statement you gave Detective Simmons?

THE DEFENDANT: Yes. It is.

MR. ADORNO: Does it correctly state your participation in the homicide?

THE DEFENDANT: Yes.

May I say one other thing?

As to Mrs. Katrina Birk's case, I was dealing with her merchandise. I would like the Court to know that Mrs. Katrina Birk and husband was dealing-- they dealt with hot merchandise. That is the way I got to know Mrs. Katrina Birk and her husband.

They had a little shop set up. It was more hot merchandise into this place than it was legal merchandise.

THE COURT: All right.

MR. ADORNO: Mr. Washington, did Detective Simmons or Majors promise you anything or in any way induce you to give this statement?

THE DEFENDANT: No. They haven't.

MR. ADORNO: I would also like to show you what has been marked as State's Exhibit No. 2, a short statement given by

the defendant to Detective Simmons after he took him out to locate the revolver and some of the property in the Pridgen and Birk homicide.

Mr. Washington, do you recognize that particular statement?

THE DEFENDANT: Yes. I do.

MR. ADORNO: Is it true and correct as to what is stated therein?

THE DEFENDANT: Yes. It is.

MR. ADORNO: Did Detective Simmons or Majors coerce you or promise you anything in return for your giving the particular statement?

THE DEFENDANT: No. They didn't.

MR. ADORNO: Judge, the final case is 76-8300. The defendant is charged along with Nathaniel Taylor and Johnny Gary Mills with first degree murder, kidnapping for ransom, robbery and conspiracy to commit robbery.

The basic facts of that is that on September 27, 1976, the defendant, David LeRoy Washington, contacted the victim, Frank Vincent Meli, reference purchasing a '74 Camaro which Mr. Meli was selling. Based on that conversation it was agreed that at approximately noon he would meet the victim at the Northside Shopping Center for the purposes of looking at the car and to make a determination as to whether to buy the car.

The meeting took place on Tuesday, September 28, 1976. The defendant took the car for a test drive and informed Mr. Meli that he had to go to his house in order to get the money to pay him for the car. Mr. Meli accompanied the defendant to 6520 Northwest 29th Avenue.

He induced Mr. Meli to go inside the house where at that time a knife was

produced by the defendant and he requested the victim to go into the back room, the southwest bedroom of the house, where he was tied up and he was then worked over by the other two co-defendants.

As alleged in the indictment the defendant at that time left with the victim's identification, some of the cash that the victim had in his pockets which was taken after he was tied up, and the victim's watch. He then took the '74 Camaro and went to several car dealerships.

Unable to sell the car, he finally arrived at Tally Embry Ford and was able to sell them the car for \$2,600. A check was made payable to Dolores DePropo which was the victim's mother who had the car registered in her name.

The defendant returned to the residence. He got the victim to endorse his signature on the check as well as

sign his mother's name. He then went to the Southeast First National Bank and was unable to get the check cashed, the cashier saying that he needed more identification with respect to Dolores DePropo.

The defendant then returned to the house. At approximately 1:55 a.m. the defendant transported the victim to a local corner telephone booth and made a ransom demand to the victim's brother saying that for the return of his brother he was to put \$2,700 in a bag and drop it at Northeast 27th Avenue and 79th Street by the Dempsey Dumpster.

On Wednesday, the police made preparations to make that particular drop. On the Wednesday the defendant returned to tell Embry Ford and had them okay the cashing of the check. That was done around noon time.

The defendant returned to Southeast First National Bank and was able to get the check cashed and received \$2,000 in small bills.

He then returned back to the residence. At that time he divided the money up, \$2,00 to Johnny Mills, \$230 to Nathaniel Taylor. At that time both of these individuals left the house. It was at that the defendant murdered Frank Vincent Meli by stabbing him to death. I believe the medical examiner's protocol states there were eleven stab wounds, I believe, five of them would have been fatal, subcutaneously, the others fatal by process of bleeding to death.

Upon the completion of the murder of the victim in this case, the defendant Washington left the house and went to the drop area which was set for three o'clock. He went to the drop area.

He was, in fact, observed there; was, in fact, photographed at the drop area at that time the police not knowing who he was and, then, he got "hinky" according to his statements that the police were there and did not make the drop pickup and went back to the house. With the assistance of Nathaniel Taylor he buried the victim under a tree in back of the house.

On Thursday he purchased a motorcycle from the proceeds of cashing the check. He purchased the motorcycle from Harry Sollen.

On Friday morning the police were able to zone in on the area by finding the taxicab driver who drove the defendant on one of the trips to the bank. Subsequently, they found the body in the backyard of David LeRoy Washington's place and he surrendered himself at 2:30 p.m.

Later on that afternoon he gave a full statement to Detective Zatrepaek and Artie Feldman at the Public Safety Department.

I would like to show the defendant a copy of that statement given to Detective Zatrepaek and Sargeant Feldman and aks the defendant if he recognizes that as being a copy of the original statement he gave.

THE DEFENDANT: Yes. I do.

I would like to speak before he says anything On the Frank Meli case, I'm guilty. I stabbed Frank Meli but I didn't stab him eleven times. I'm the cause of his death. Frank Meli stayed with me two full days. We watched a fight on TV. He ate. I went out and bought him food.

I'm on trial for me, not nobody else. I'm guilty of that crime. All I can say is--

THE COURT: For the purposes of this plea, Mr. Washington, the Court is concerned with whether or not you inflicted the wound upon Mr. Meli and that it was your desire and intention to effect his death.

THE DEFENDANT: Yes. I did.

THE COURT: As relates to the contents I am not asking you about other participants in that case, although, their counsel are here and present. I am only concerned that the statement that you have given in this case was freely and voluntarily given by you and that it was not given as a result of undue or any pressure by the police department and that no offer of reward or threats were in any way involved in the giving of the statement.

THE DEFENDANT: It wasn't.

Can I say one other thing?

THE COURT: Sure.

THE DEFENDANT: I have been living right here in Dade County for eleven years and up until September of this year I never was arrested in Dade County for anything.

You fault me for the crimes I committed, but you got to go a little further back and see why I did commit these crimes.

THE COURT: I intend to. I am only here right now for the purpose of determining whether or not there is a factual basis for the pleas you are making in this case and whether or not it is what you want to do and that you are doing it under the right circumstances.

We will go to the penalties and those matters some other time.

MR. ADORNO: Mr. Washington, do you recognize the Detective Zatreplek seated

to your left?

THE DEFENDANT: Yes. I do.

MR. ADORNO: Did he or any other people of the Public Safety Department or State Attorney's office give you undue pressure or coerce you to give the statement that is marked as State's Exhibit on Plea No. 1?

THE DEFENDANT: No. They didn't.

MR. ADORNO: Finally, in 76-8646 the defendant entered a plea of guilty to assaulting a law enforcement. The factual basis for that particular, I believe, is that after arraignment in your court here on October 13, 1976, on the way to go back to the holding cell, back to the Dade County Jail, this particular individual assaulted and did batter one James Birch, a corrections officer and deputy sheriff with the Dade County Safety Department.

THE DEPARTMENT: May I be allowed to speak on that one, sir?

My intentions was not to escape. It don't make sense if I give myself up. The officer was laughing about my case in the cell and we coming in here for my life.

My intention was not to jump on the other officer. My intentions was to jump on him. That was it.

THE COURT: That was the young man that was in my court and it was his first day.

THE DEFENDANT: My intentions was not to get him, but I got him.

MR. TUNKEY: For the record indicating Mr. Ciaburro.

THE COURT: He was a new corrections officer back there and I have not seen him since.

THE DEFENDANT: I wasn't trying to

escape.

MR. ADORNO: One further question.

Mr. Washington, do you recognize Detective Harry Spiegel of the Public Safety Department seated to my left?

THE DEFENDANT: Yes. I do.

MR. ADORNO: He is the lead investigative officer on the Frank Meli homicide.

Did he or anybody at the Public Safety Department make any promises or inducements for you to give any statements you gave?

THE DEFENDANT: I gave them all freely and voluntarily because I committed a crime and it was on my conscience.

THE COURT: Mr. Washington, how far did you go in school?

THE DEFENDANT: As far as school is concerned, I went to the tenth grade.

THE COURT: And your age is what?

THE DEFENDANT: I am 26 years old.

THE COURT: There seems to be question in my mind as to why some people are willing to admit their violations of the law and some people are eager to do so. Is there any other reason that you like to tell me as to your obvious eagerness to admit your responsibility in these cases other than that which I heard?

THE DEFENDANT: Like I said, Judge, I have been living here in Dade County for eleven years and in my neighborhood I was well-respected.

I got laid off of my job in October '74 and I got a wife and two kids that I love and they put me on unemployment compensation.

That ran out this year. My just had a baby in September. I didn't even have Pampers to put on my baby's behind.

THE COURT: Relax. We have all day,

my friend. You just relax.

THE DEFENDANT: My intentions was not to hurt anybody on two of these cases with the exception of the one.

I go to church and I believe in God and all of this. I want to say that Reverend Daniel Pridgen, I meant to stab him. I can't dig a man preaching in the church every Sunday and a homosexual. When I was stabbing, that was all that was going through my mind was him getting up on the pulpit every Sunday and taking these people in the pulpit money and he was a homosexual.

Like I say, I been here eleven years and I never been in the Dade County Jail, nothing but a traffic violation.

You take my job away from me--

THE COURT: Sometimes we got folks, Mr. Washington---

THE DEFENDANT: --and I got a wife

and kids and I had a wife and kids--maybe that wasn't the way I should have gone about it. That is the first time I committed a crime. I panicked on a lot of these things.

As far as I'm concerned I might not get another day on this earth. I am looking for whatever is in store for me, if I die or whatever in another world, you see what I am saying, but my intentions was not to hurt anybody else.

My wife was supposed to have a baby in September. She had the baby. Okay. I panicked. I had no money. I couldn't--nobody to turn to. Welfare pays \$74 a month and me sitting outdoors. I didn't--I done hollered to momma so much they were tired of me. I was looking for work and they was thinking I'm not looking for work. If you check with the

unemployment office I was there almost every day. The jobs I found work me a day or two. My wife has a baby and it sneaked up on me. I went to the hospital to see her at Jackson Memorial Hospital.

She was telling me all the things that she needed for the baby because at Jackson they bring the baby in the world but they don't provide the things.

She was telling me all the things she needed and I said, "Yes, baby. I'm going to get it." I didn't have no way to get money. I committed crimes and people got killed. All I got to say is if David Washington had a job you wouldn't see me here today.

THE COURT: The first professional involvement we had in this case was the time I learned the matters were assigned to our division. There was a conflict

presented by the Public Defender's office and at the time we provided counsel for the people involved in, I think, the 8300 case and Mr. Tunkey was one who was highly competent and who specialized in the field of criminal law.

Are you satisfied with the way he worked your case?

THE DEFENDANT: I want to say this. I think this is about one of the best lawyers you could ever get. But for the crimes I feel I was 100 percent--I was guilty. I would have gave up. I believe I would have got with my wife and I would have come forth with the evidence anyway. He didn't have no grounds to fight it on. I don't believe in telling no lies. You understand what I am saying?

THE COURT: As an officer of the court, it is his responsibility to take the legal steps necessary for the

protection of his client's interests.

THE DEFENDANT: I understand.

THE COURT: Do you understand that by pleading guilty you, in fact, stop that work that he is doing and those steps that he may have made be they technical or otherwise. Now, he is foreclosed from doing them.

THE DEFENDANT: Yes, sir. I understand.

I want to say this. Like I say, you can't get a better lawyer. He didn't have any grounds to fight on because I gave a confession.

THE COURT: He mad himself available at the time you wanted to see him?

THE DEFENDANT: He was there. He was always there.

THE COURT: You have no reason to indicate to me anything other than you

would have me appoint him on another case?

THE DEFENDANT: I tell you this, if it was left up to him, he would fight this to the Supreme Court. But, I told him I would rather go ahead and plead because it don't make sense to try to hide it when I know I'm guilty.

THE COURT: Do you understand that by constitution all of us within the border of this fine country are given a number of rights because we are here? Do you understand that you have an absolute right to remain silent or keep your mouth shut, any way you want to say it, and not say a thing or do a thing that would in any way point a finger of guilt at yourself? Of ocourse, you have signed those statements. The question of their admissability is resolved by your pleas, but I want you to understand that you

have the right to remain silent. You do not have to admit your guilt in this case.

Do you understand?

THE DEFENDANT: I want to say this, Judge. I didn't have no right to take these people's lives. I think it is best for me to come forth with it. Like I say, I do believe in God. Maybe I will go somewhere else when I leave the world. I don't want to do it with this on my conscience.

THE COURT: I am concerned, before we talk about penalties, that you have the absolute right to remain silent and not say a word and that you understand those rights.

THE DEFENDANT: I understand.

THE COURT: Do you understand?

THE DEFENDANT: Yes. I do.

THE COURT: You also have an absolute right to have a jury trial in open court,

like this, with competent counsel representing you and examining and cross-examining those witnesses that are the ones that caused the charges to be brought against you.

Do you understand those rights as to the Constitution?

THE DEFENDANT: Yes. I do.

THE JUDGE: By telling me, "Judge Fuller, I am guilty of these charged" you are giving up those constitutional rights. Do you understand that?

THE DEFENDANT: I understand that.

THE COURT: You also have a right under our law to have a jury impaneled for the purpose of determining or making a recommendation to the Court as to what penalty would be involved in this case. They would be impaneled. They would hear testimony that would relate to the aggravating circumstances of the crimes involved.

They would hear evidence as relates to any mitigating circumstances, your background, and whatever other things might be covered by an enumerated list.

Do you understand that?

THE DEFENDANT: Yes. I do.

THE COURT: Mr. Tunkey has discussed that with you, has he not?

THE DEFENDANT: Yes. He has.

THE COURT: By saying, "Judge, I don't want a jury to make a recommendation. I want you to hear it," you are giving up the right you have to have a jury do that.

Do you understand that?

THE DEFENDANT: Yes. I do.

THE COURT: It is your desire to have me and me alone to determine your fate. Is that what you are saying?

THE DEFENDANT: Yes. I do. I understand that.

THE COURT: Has Mr. Tunkey and Pollack or anybody involved in these conversations given you any indication as to what results I would arrive at in this case.

THE DEFENDANT: No. I Haven't.

THE COURT: Has anybody told you I am a soft touch or else go for this or that or something for the purposes of getting you to plead?

THE DEFENDANT: I want to say one thing, Judge. No. He hasn't. When a person comes before you he just about knows what he is going to get.

THE COURT: I am not sure whether that is good or bad.

It is obvious you are aware, at least through Mr. Tunkey, that my normal feeling in cases involving crimes of violence is that I give the maximum sentences.

THE DEFENDANT: Yes. I do.

THE COURT: You may just as well get the death penalty from me as not. I will follow the law. I am not one of those judges that will automatically not give the death penalty. Do you understand that?

THE DEFENDANT: I do.

THE COURT: These ocunsel and officers of the Court will stay strictly away from me. There will not be a bit of discussion about your case, I can guarantee it, outside this courtroom, and I don't want you ever coming back here, if in fact it whould be determined that I find the aggravating circumstances outweigh the mitigating circumstances and sentence you death, and hear Mr. Tunkey or Pollock say somebody told you that was not what I was going to do.

THE DEFENDANT: Yes, sir. I understand.

THE COURT: Has anybody told you there was any deal involved in my court?

THE DEFENDANT: No, sir.

THE COURT: I would sure like you to tell me if there was.

THE DEFENDANT: I would like to say this. I believe the crime fits the punishment and I don't want to die. You understand what I'm saying, but I say if I got to sit up in some jail and rot I would rather get the chair.

THE COURT: We will resolve the question of punishment. I want you to be satisfied that I have a great deal of respect for people who are willing to step forward and admit their responsibility. That is not an automatic key to the door nor is it anything else.

We will have a hearing on what the evidence is, but I do not want you to

be laboring under some pretense that is false that I let my feelings be known as to what sentence I would give in this case.

The only conversation I have had with these two lawyers whether or not I would hear this case without a jury and I told everybody I would hear every case without a jury as long as both sides would waive that right. I am not afraid of the case. I want you to understand that that is the extent of my involvement.

Have you any information that would lead you to believe that there has been anything more than that?

THE DEFENDANT: No. I haven't.

THE TUNKEY: I can put on the record--I am sure he will agree with me--that if anything I told him there is absolutely no guarantee as to what sentence; that it could be consecutive life terms with no

parole, or he could face the electric chair on each one. I told him I do not have any information concerning what the sentence might be.

As far as that area of the questioning, that has been our conversation on numerous occasions.

THE COURT: How is your treatment at the jail, Mr. Washington?

THE DEFENDANT: If you could do something about it, I wish you could get me out of the hold. I have been in the safety cell thirty days.

THE COURT: I think they are worried about you.

THE DEFENDANT: I don't know what it is, as far as my conditions is.

THE COURT: Are taking any medication?

THE DEFENDANT: No. I never mess with anything.

THE COURT: Do you suffer from any emotional problems that would interfere with your ability to understand what we have been talking about here?

THE DEFENDANT: I'm just as sane as anybody in this courtroom.

THE COURT: Nobody has forced you to do something or threatened you to do something that you do not want to do in this case?

THE DEFENDANT: No. They haven't.

Could I say one other thing just for the record. They say where I bought this motorcycle. This money, or the \$1,100, I bought a motorcycle with, but you can bet before I bought any motorcycle my wife and kids had everything they needed and wanted and I bought this motorcycle for transportation to try to look for a job. I made sure they had everything they wanted. It didn't make sense to take the

money and try to move into a place and try to live when they would have sent me out into the street again. That is what I want to say.

THE COURT: It is my understanding that the State is also in the position as it relates to the necessity of the jury for a purpose of making a recommendation to the Court. Whatever right the State may have, you also waived that right?

MR. ADORNO: We waive any right. We will present the evidence to the Court since you have the final determination anyway.

THE COURT: Are there any other questions, Mr. Tunkey, you would like to cover with Mr. Washington?

MR. TUNKEY: I would like to put on the record that there is still unresolved

a motion on each of the indictments to dismiss or, alternatively, to declare the Florida death penalty statute unconstitutional. We are not waiving any right as far as that motion is concerned.

THE COURT: Whatever the sentence of the Court would be would be subject to review and I have previously and will now for the purposes of completing your record determine at this time that the statute is, in fact, constitutional and, of course, by his plea Mr. Washington gives up whatever appeals he might have as to intermediate rulings of the Court or a finding of guilt by the jury. But, of course, he would have a right to appeal and I will advise him of that right at the conclusion of the sentencing hearing and my pronouncement of sentence in these cases. That will automatically be reviewed by the Florida Supreme Court under any circumstances.

What else did you want to say?

MR. ADORNO: Since the defendant is entering a plea of guilty on three counts of first degree murder, the only sentence would be life imprisonment in the State prison with no possibility of parole for 25 years, which is the minimum sentence, or death.

THE COURT: I am aware of that.

MR. ADORNO: I do not know if the defendant was told that by Mr. Tunkey.

THE COURT: I do not know whether he has or not.

From where you stand you can either end up with three death penalties. You can end up with a combination of any of them. Whatever it would be you would have no less than 25 years of imprisonment if I find the mitigating circumstances you would still end up with that much.

I am satisfied that Mr. Washing-

ton knows his cards are on the line.

MR. ADORNO: Did anybody on behalf of the State Attorney's office or police make you any promises that for your plea that any type of consideration would be given to your brother, Nathaniel Taylor, or the other defendant?

THE DEFENDANT: I would like to say this. No. They didn't, but I gave myself up because I gave myself up because I was guilty. It is up to you all to decide whether he was guilty or not. As far as I am concerned he was innocent.

THE COURT: As relates to the relationship of the defendant in court, I do not take into consideration and would not want a part of anything to be an agreement either to or not to testify. So, I want you to understand that this plea is made here because you feel you are, in

fact, guilty and for no other reason and that there have been no other considerations made to you for the purpose of inducing you to make that plea.

A No. There haven't.

THE COURT: Mr. Washington, I am satisfied as best I can be that you are an intelligent young man who certainly understands the seriousness of the charges that have been brought against you by the one information, and of course, the three indictments handed down by the grand jury;

That you understand that your plea in this case waives whatever constitutional rights you may have to remain silent and to attack anything that would relate to the grand jury;

To give up whatever attacks you may have had as a legal argument concerning confessions and all these other matters. I am satisfied that you know that

you have a right to trial by jury and that you freely and voluntarily waived that, I'm sure, in hopes that you might fare better with the Court than you would with the jury. But, that is a logical conclusion and all I can do is remind you that may not be the case.

It will be determined on the evidence here. I am satisfied that your pleas in this case as your statements were freely and voluntarily given. I have no indications to the contrary and if there is anybody that has such information in this courtroom, they should now let me know.

I am certainly satisfied you have been represented up to this point and will continue to be represented through Mr. Tunkey and I find him to be a very able and competent counsel and that you have had ample opportunity to discuss this

matter with him and, in fact, are entering pleas in this case that take away from him the opportunity of really being a lawyer that he would like to be for you.

But, I respect you for that and I think it speaks in your favor.

There certainly is a factual basis for the Court to accept your pleas in this case and on that basis I will do so.

Is there any indication by counsel as to the length of time necessary for the purpose of trying the sentencing aspect of this case?

MR. ADRONO: I believe, Judge, if we had a day and the Court started at a reasonable time at the conclusion of morning calendar, we should be able to get finished in a day.

THE COURT: I am in the middle of a case that will finish this week, but not

in time in time to try this case. I have no objection to setting it at the close of my calendar on Monday.

MR. ADORNO: That is fine. It will give me time to get the witnesses.

MR. TUNKEY: That is fine.

THE COURT: I am sure Mr. Washington would like to have terminated one way or the other at the earliest opportunity rather than worrying about it. We will go ahead and do that. We will set it down for trial after I call my morning calendar.

I would like to suggest to the people involved in the facts of this case and know information concerning it, each of you, to have ready for me at the time both of you rest proposed findings that would allude to both aggravating and mitigating circumstances. I do not want it beforehand, but I would like some facts by

way of written memorandum thereafter.

MR. TUNKEY: As to what the Court's findings should be?

THE COURT: No, sir. As to what you think the mitigating circumstances are based upon the outline set forth on the Supreme Court and the Committee on Jury instructions and the State will provide a proposal as to what aggravating circumstances they think have been established.

I have no way to tell you at this time as to when our decision will be. Is there anything else to be on the record?

MR. TUNKEY: I would like to have the Court enter an order recommending that the defendant be allowed use of the telephone at the jail so that he can secure the attendance of his wife. There is no problem as far as subpoenas. If he wants to, I

do not know that he wants to.

THE COURT: I do not get involved with Mr. Sanstrom's facility across the street any more than he gets involved in mine. I cannot evaluate the conduct.

MR. ADORNO: That will be no problem. If he wants, Detective Simmons will get a hold of his wife.

THE COURT: Whatever provisions can be made so that everybody is comfortable is what I would like to have happen. All we can do is evaluate by experience.

Are there any other findings you would like me to make?

MR. ADORNO: I would ask that Your Honor accept the plea and I would like to have the defendant adjudicated and fingerprinted.

THE COURT: Yes, sir. I think that should be done in all four cases.

MR. ADORNO: What is the status of the other two co-defendants?

THE COURT: I would anticipate they will not be tried until this case will be tried.

MR. ADORNO: Do you want to hear the motions?

THE COURT: If there are pending motions as relates to the others---

MR. DENARO: We have motions to sever the defendants Mills and Taylor, and motions to suppress which will require the taking of testimony and, I assume, the taking of testimony by the State in rebuttal. I think that could last a day. I do not know the State's intentions. I do not know whether they wish to try it immediately after the penalty phase of Mr. Washington's case or move for a continuance.

THE COURT: I do not know what

evidence there will be as relates to the penalties. That may make some difference as to whether the Court feels it should be tried at that time.

I will ask the State to please be on standby. In any case, I do not want to hear it until I have heard the sentencing hearing on Monday.

[Whereupon, the proceedings were concluded.]

- - -

CERTIFICATE

STATE OF FLORIDA)

COUNTY OF DADE)

I, Margaret Rock, do hereby certify that a hearing for plea in the case of The State of Florida, Plaintiff, versus David LeRoy Washington, Defendant, pending in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, Nos. 76-8300, or 76-9542, 76-9543 &

76-8646, was held before The Honorable Richard S. Fuller, as Judge, December 1, 1976; that I was authorized to and did report in shorthand the proceedings and evidence in said hearing; and that the foregoing pages, numbered from 1 to 39, inclusive, constitute a true and correct transcription of my shorthand report of said hearing.

IN WITNESS WHEREOF, I have hereunto affixed my hand this _____ day of _____, 1977.

IN THE CIRCUIT
COURT OF THE
ELEVENTH JUDICIAL
CIRCUIT IN AND
FOR DADE COUNTY,
FLORIDA

CRIMINAL

THE STATE OF FLORIDA,)	
Plaintiff,)	NOS. 76-8300
		76-8646
vs.)	76-9542
		76-9543
DAVID LEROY WASHINGTON,)	
Defendant.)	

Metropolitan
Justice Building,
Miami, Florida,
Monday, 10:30 a.m.,
December 6, 1976.

The above-entitled case came on for
sentencing before The Honorable Richard S.
Fuller, Circuit Judge, pursuant to Notice.

APPEARANCES:

RICHARD E. GERSTEIN, State At-
torney, by RICHARD E. GERSTEIN,
Esq.,

AND

HENRY N. ADORNO, Esq., of Coun-
sel,

Attorneys for Plaintiff,

POLLACK, TUNKEY, ROBBINS &
ROSENFELD, by WILLIAM R. TUNKEY,
Esq., of counsel,
Attorneys for Defendant.

* * *

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THE COURT: We are here on the Washington matter. Let's go ahead, please.

MR. ADRONO: If the Court please, I would like to make a brief opening statement as to what the evidence tends to--

MR. TUNKEY: I will object to opening statements as not being provided by the rules, and I will ask that if he has any witnesses that he simply present them at this time.

THE COURT: Overruled. Both of you

will have ample opportunity. Go ahead.

MR. ADORNO: Judge, we are here on Case No. 76-8300, 76-9542, 76-9543. The evidence the State is going to present to this particular court to determine whether or not the court should sentence the defendant to death or life imprisonment is going to cover a thirteen day period in the life of the defendant. It will begin on September 19, 1976, and conclude with October 1, 1976. It is a thirteen day period when the State is going to show that the defendant committed three separate murders and attempted to commit three other ones. It is going to be a period, the evidence is going to show, that the defendant did not discriminate between his victims. It is going to show he killed both male and female, both old and young, both black and white. But there is one thing that is consistent to

all three of the homicides that the State is going to bring before the court, in that all three victims that were killed, at the time they were killed, were incapacitated and completely helpless. I believe that the evidence that we are going to present to you, Judge, is going to indicate that there are at least four to six aggravating factors present in all three cases. The first case, in the period of time, was the murder of Reverend Daniel Pridgen, which occurred on September 20, 1976. The evidence presented to the court is going to show that on September 19, 1976, a Sunday, the defendant, along with a friend of his by the name of Johnnie Mills planned to kill the Reverend Daniel Pridgen after robbing him. They met the reverend there at the local laundromat. Besides having his duties as a preacher,

he also ran a laundromat to supplement his salary. The evidence is going to show that the defendant not only intended to rob the victim but also made up his mind at that time that he was going to kill the victim because the victim was a homosexual and the defendant could not condone a preacher being a homosexual. The evidence is going to show that the plan was that Johnnie Mills would approach the victim and set up a meeting where Johnnie Mills would commit a sexual act on the reverend. Once inside the reverend's house, Johnnie Mills was to give a signal. He was to cough two times and at that time the defendant, David Washington, would run into the house and would kill the victim and then they would look for any proceeds from the robbery. The evening of September 20, 1976, the plan went into effect.

The defendant, along with Johnnie Mills, went to the reverend's house. They both went inside the reverend's house, had a brief conversation. According to the plan, the defendant excused himself and went outside and waited by the door for the signal of the two coughs. A few minutes later Johnnie Mills, having waited for the reverend to get undressed, took a pillow and placed it over the victim's head. At that time he coughed two times and the defendant came back into the house, carrying a butcher knife and stabbed the Reverend Daniel Pridgen to death. I believe the medical examiner will indicate that there are approximately ten to eleven stab wounds. At that time they ransacked the house. They found some money, some jewelry and the keys to the reverend's car, and in order to throw

off the police and in order for David Washington to let the community know that the reverend was a homosexual, they left writings on the wall indicating that fact and they left in the victim's car. They split the proceeds and subsequently abandoned the car. As to this particular case, the State submits that there are four aggravating factors. One, the murder was committed while in the commission of the robbery; two, the murder was committed for monetary gain; three, the murder was also committed to dispose of the only eyewitness to the crime, the only person that could finger David Washington and Johnnie Mills, thereby, there was an attempt by both of those individuals to prevent arrest and subsequent prosecution, and finally, that the facts in this case when the medical examiner finishes testifying will establish that this was clearly

a planned execution, a most cruel, heinous and atrocious crime. The day that the Reverend Pridgen was found, which was the 21st, also coincided with the arrival from Indiana of three sisters, Julia Sullivan, Georgia Griffith, and Ruth Pitzer. These three sisters, whose ages ranged from 68 to 73, flew down to Miami to visit their brother who was in the hospital convalescing from some injuries. They were met at the airport by their sister-in-law, Kay Birk, They stayed at Kay Birk's house on a Tuesday, on Wednesday. Thursday evening the four ladies were at home and they were watching the Carter-Ford debates. During the telecast of the debates, the defendant, David Leroy Washington, broke through the front screened door and came into the house wearing strips of cloth over his face as a disguise and brandishing what turned out to be a .22

caliber pistol. The defendant told the individuals that if they would not do anything he would not hurt them. He requested them to lie down on the floor. They told the defendant that Ruth Pitzer could not do that because she was suffering from Parkinson's disease. The defendant allowed Mrs. Pitzer to sit in the chair where she had a vantage point to watch subsequent actions of the defendant, Georgia Griffith was the lady down on the floor and her hands were tied behind her back. Julia Sullivan said that she could not because of her weight have her hands tied behind her back and her hands were tied in front. Ruth Pitzer was allowed to remain seated. The defendant then took Kay Birk into the kitchen where Kay Birk turned over a tin cup which contained an amount of money, I believe somewhere around \$80 to \$90. They came back and

Mrs. Birk got into a struggle with the defendant. The State alleges that the defendant produced the knife and stabbed Kay Birk. The medical examiner indicates there were approximately nine stab wounds. Kay Birk fell to the floor. The defendant then went and got a towel, wrapped the towel around the gun as a silencer and went to Kay Birk as she was lying on the floor and shot her one time, the entry wound being in the back of the head, jsut back of the right ear. Then he went and he shot Georgia Griffith. The bullet in Georgia Griffith went straight through from the side temple exiting the opposite side. Georgia Griffith was also stabbed. Julia Sullivan was shot while lying on the ground in the back of the head and stabbed one or two times on the side. Ruth Pitzer is the last one he went up to

Mrs. Pitzer, I believe, will tell the court that she pleaded with the defendant not to shoot her. The defendant responded by placing the gun to her forehead and firing one shot. The bullet fragmented and parts of the fragments still remain on her right eye where, as a result of that particular bullet, the wound, she has lost that sight. The defendant then kicked her, pushed her down and threw a chair on top of her. She does not remember being stabbed. However, the medical testimony was that she was in fact stabbed five times. The defendant then fled with the proceeds from the robbery. Mrs. Julia Sullivan had not lost consciousness, was able to crawl to the bedroom and call the police and rescue squad which arrived shortly after. The State submits in this particular case under those facts that there are six aggravating factors that the

court should take into consideration:
One, again, the murder was committed in the commission of a felony, to-wit: Robbery. Two, the sole motive behind this particular crime was pecuniary gain; three, this particular crime caused great risk to the safety of others as indicated by the fact that he killed or attempted to kill four individuals, four, that the conclusion of this offense and as the defendant stands before this court, he has now been previously convicted of another capital felony, having killed the Reverend Daniel Pridgen some three days prior; five, again, this crime was committed, as the other, to dispose of any of the eyewitnesses that could bring the defendant to justice and, lastly, again, the fact that shooting three incapacitated women, because they were tied and one suffered from Parkinson's disease, clearly established

that this crime was most cruel, heinous, and atrocious. Some approximately three to four days later, the Frank Meli case begins. On Monday, September 22, 1976, the defendant contacted Frank Vincent Meli, a 20-year-old University of Miami student, a senior, on the dean's list, graduate, in accounting. The victim, Mr. Meli, was selling his automobile, a 1974 Camaro. The defendant called him and told him that he was interested in buying the car and would he be kind enough to meet him at 12:30 p.m. on Tuesday. Based on that agreement the victim, Frank Meli, met the defendant. At that time the defendant told the victim, "Let's take the car for a test drive." After taking it for a test drive he told Frank that he wanted to buy the car. "Let's go to my house where I can give you the cash." He arrived at 6520 Northwest 29th Avenue, the

residence of the defendant, and his step-brother, Nathaniel Taylor, and another individual, Johnnie Mills, were present. He told the victim to come into the house because he didn't want to give him the thirty-four hundred dollars or thirty-six hundred dollars because there might be a robbery or something might happen outside and to please come into the house where it would be safer. Immediately upon entering the house the defendant brandished a knife and forced the victim into the southwest bedroom of the residence where by prearrangement Nathaniel and Johnnie Mills were waiting for him. At that time they tied up the victim and laid him down on the bed. The defendant went through the victim's pockets taking some money, all of the identification and his watch. He left the victim there with Nathaniel Taylor and Johnnie Gary Mills and he took

the victim's car and attempted to sell it. He was unsuccessful with the first three or four dealerships that he went to. Finally, in the early afternoon he was able to sell the car at Tally Embry Ford for twenty-six hundred dollars. He received the cashier's check for twenty-six hundred dollars. The cashier's check was made out to the mother of the victim, the title of the car having been in her name. The defendant took a taxi cab and attempted to cash that check at the Southeast First National Bank. The cashier told him that they could not cash the check because there was insufficient identification identifying him. The defendant took the taxi cab back to his house and went inside and told the others what the problem was that he was having. The defendant kept watch over the victim Tuesday night. It

was in the early morning hours of Wednesday, at approximately 1:55 a.m., that the defendant took the victim out of his house and down the street to a corner telephone booth where he forced the victim to call his brother and make a ransom demand for twenty-six hundred dollars, excuse me, twenty-seven hundred dollars. The ransom money was to be delivered by Angelo Meli that sam Wednesday at approximately 3:00 p.m. by placing it in a brown paper bag behind a Dempsey Dumpster at Northwest 27th Avenue and 79th Street. The morning, Wednesday morning, of September 29, the defendant again left the victim in the custody of Nathaniel Taylor and Johnnie Mills, returned to Tally Embry Ford, demanded from them to give him the car back or make good on the twenty-seven hundred dollars. Tally Embry Ford contacted Southeast First National Bank,

an officer, and told him that it was okay to cash the check. The defendant then went down to Southeast First National Bank and was able to obtain twenty-seven hundred dollars in small bills. The defendant then returned to the residence approximately at 1:00 p.m. He gave Nathaniel Taylor \$230 from the proceeds of the sale of the car. He gave Johnnie Mills \$200. At that time Nathaniel Taylor and Johnnie Mills left the room. The defendant walked back into the southwest bedroom where the victim was still tied and lying on the bed and at that time proceeded with what we can only describe as the cold-blooded execution of Frank Vincent Meli. He was stabbed some eleven times. The medical examiner, Dr. Ronald Wright, the deputy medical examiner for Dade County, I beleive, will tell the court that in his medical opinion the victim was

completely incapacitated at the time he was being stabbed to death; his hands were either tied behind his back or tied to the corners of the bedposts. There is absolutely no evidence whatsoever of a struggle being put up by Frank Vincent Meli. The defendant left the body in the bedroom. Death did not come quickly to Meli. The medical examiner said it would take several minutes to die even though there was one instantaneous stab wound which the State will submit was the last stab wound inflicted by the defendant upon the victim. The defendant then realized that it was close to 3:00, decided why not, why not attempt to cash in twice and go pick up the ransom money. The defendant went to the corner of 27th Avenue and 79th Street, and was present at the time that Angelo Meli drove up in the car and placed the brown paper bag behind the

Dempsey Dumpster. However, according to Washington's own words, he became "hinky", he suspected that there were police officers in the area, and he did not pick up the money. He returned to the residence and later on that evening, on Wednesday night, approximately 11:00 to 12:00 buried Frank Vincent Meli in the back yard in a grave about four foot deep; covered up the grave and went on about his business. On Thursday, September 30, the defendant contacted Bill Coleman and purchased from him a motorcycle for eleven hundred dollars. The remaining part of Thursday the defendant enjoyed driving the motorcycle around, showing it to his friends, and later on that day he went to the dog track and later that evening spent the proceeds at the Castaways Lounge and Hotel on Miami Beach. On Friday morning the police zeroed in on the particular area and at approximately

1:30 that afternoon, Detective Wolf and another detective discovered what they thought appeared to be a grave. At that the defendant came walking down the street with his hands above his head and his pockets inside out and surrendered himself, indicating he was the one that killed the white boy and pointed to the grave where the victim was subsequently found. The State will submit under the facts of that particular killing that there are at least five aggravating circumstances. The first murder was committed in the commission of a felony. In this case we have two felonies, robbery and the kidnapping. Second, as well as all three homicides, they were done for pecuniary gains, the procurement of the car and the subsequent selling of it. Third, the defendant as he stands before the court on the Meli murder has now previously been convicted of two other

capital felonies; that of Katrina Birk and that of the Reverend Daniel Pridgen. Four, again the murder was committed to dispose of the only eyewitness who could not only identify him but could at least take the police to the house where he had been kept captive, and finally, probably the one out of the three that is probably the most cruel, heinous and atrocious murder, the cold-blooded execution of a young boy who was tied and totally incapacitated at the time of this murder. I submit that the court, after the court has heard thirteen days in the life of David Leroy Washington and looked at the aggravating circumstances, the court will have but one choice, one legal choice, but to impose the death penalty. The State at this time calls Detective Charles Major.

THE COURT: Would the defendant like to make an opening statement.

MR. TUNKEY: I have filed with the court a memorandum regarding sentencing. The State did not. I will rely upon that memorandum at this time and will waive opening statement, reserving the closing argument.

THE COURT: I believe at the time I set this, I think it was last Thursday or Friday, I requested that both counsel prior to the time of the determination of the sentencing procedure, or at least this part of the proceeding, if they wished, to submit a memorandum in aggravation or mitigation, and I am glad that you were able to do it.

MR. ADORNO: We have that memo, Judge. I will present it at the end of the hearing.

MR. TUNKEY: I will ask that the rule be invoked, Your Honor.

THE COURT: Who are the witnesses who

will testify?

MR. ADORNO: They are on different cases and there is no relationship. I don't think there is any necessity for the rule to be invoked.

THE COURT: What is the necessity for it if they are on different matters?

MR. TUNKEY: Well, Your Honor, I am not aware of the different matters.

THE COURT: We will invoke it. The witnesses will please come forward and we will have them sworn.

[Thereupon, the witnesses were duly sworn.]

THE COURT: Have a seat outside the courtroom except for the first witness, please. Do not discuss the case any more until after you have had a chance to give all of your testimony. Go ahead, counsel.

MR. ADORNO: Detective Major.
Thereupon:

CHARLES MAJOR

was called as a witness on behalf of the plaintiff, and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ADORNO:

Q Would you state your name and official position?

A Charles Major, Police Officer, Dade County Public Safety Department, assigned to the Homicide Section.

Q And how long have you been assigned to the Homicide Section of the Dade County Public Safety Department?

A Since April of 1974.

Q And how long have you been a police officer with the Public Safety Department?

A Since 1970.

Q Did you have occasion to become involved in the homicide of the Reverend

Daniel Pridgen which occurred on September 20, 1976?

A Yes, I did.

Q And what was your responsibility with respect to that particular homicide?

A I was assigned as the lead investigator on that date.

Q When did you first become involved in that investigation?

A On Tuesday, 21 September, at approximately 6:00 p.m.

Q Sir, did you have occasion to go to any particular location with respect to that investigation?

A Yes, sir. I was directed to go to 2773 Northwest 57th Street, Apartment No. 8, the residence of the victim.

Q Would you describe those premises for the court?

A The premises--there are like four separate structures. Each structure

consists of two apartments, and apartment No. 8 is situated on the southwest corner of the lot.

Q Did you have occasion to go into that apartment?

A Ues, sir, I did.

Q Would you describe the surroundings, how many rooms the apartment had?

A There was one exterior door which is located in the east side of the apartment. It is the only exterior door to the apartment. The inside of the apartment consists primarily of one large room which is used as both a living room and a bedroom with the two areas being divided by a couch.

Q Upon entering the apartment did you find any signs that would indicate there was a breaking and entering into that particular apartment?

A No, sir. The door was found unlocked. There was no evidence of forced entry. There was complete ransacking throughout the apartment, drawers pulled out, articles scattered about the floor.

Q Let me show you what has been marked as State's Exhibit No.1 for Identification and ask you if you recognize that?

A Yes, sir, I do.

Q Does that truly and accurately depict what is portrayed therein?

A Yes, sir. This is a view from the entrance door to the apartment.

Q Is that the way you saw it when you first entered the apartment on September 21, 1976?

A Yes, sir, it is.

MR. ADORNO: The State would move No. 1-A for Identification into Evidence at this time, Your Honor.

THE COURT: Mr. Tunkey?

MR. ADORNO: There are several that I will introduce.

MR. TUNKEY: No objection.

THE COURT: Why don't you check through those and see if you have any objection or if we can let them in.

MR. TUNKEY: As to some of these, I believe they are duplicitous. They are color photographs. I believe they are being introduced solely to sway the court, but they don't have any relevance or materiality. The defendant has pled guilty to the murders.

THE COURT: We will go through each one then.

[Thereupon, State's Exhibit No. 1-A marked for Identification was marked as State's Exhibit 1 and received into

Evidence.]

MR. ADORNO: If I may publish the exhibit to the court, please.

THE COURT: Just pass them up here.

Q [By Mr. Adorno] Did there come a time that you came in contact with an individual who later became to you as Reverend Daniel Pridgen?

A Yes, sir.

Q Where was he the first time you saw him?

A He was located on the bed in his apartment.

Q Did he have any clothes on at that particular time?

A No, sir. He was nude.

Q Let me show you what has been marked as State's Exhibit 1-E for Identification and I will ask you to tell the court if you can identify that particular photograph.

A Yes, sir.

Q Does it truly and accurately depict the scene as you saw it on September 21, 1976?

A Yes, sir.

MR. ADORNO: The State would move 1-E for Identification in Evidence, Your Honor.

MR. TUNKEY: I objection on the grounds previously stated.

THE COURT: The objection is overruled. It will be admitted.

[Thereupon, the document referred to was marked as State's Exhibit No. 2 and received into Evidence.]

Q [By Mr. Adorno] Detective, State's Exhibit No.2 depicts the position of the Reverend Daniel Pridgen when you first saw him on September 21, 1976.

A Yes, sir.

A Yes, sir.

Q Did you have occasion to examine the Reverend Daniel Pridgen?

A Yes, sir, I did.

Q Were you able to determine what you believed to be the cause of death?

A Yes, sir.

Q And what was that?

A Multiple stab wounds.

Q Let me show you a series of three photographs marked as State's Exhibits 1-D, 1-C, and 1-B, and ask you whether you recognize those three particular exhibits?

A Yes, sir, I do.

Q And do they truly and accurately depict the scene as you saw it on September 21, 1976?

A Yes, sir.

MR. ADORNO: The State would move all three of those into Evidence, Your

Honor.

MR. TUNKEY: Objection, Your Honor. They are irrelevant, immaterial. They are duplicitous and I object on the grounds previously stated.

THE COURT: Overruled.

[Thereupon, the photographs referred to were marked as State's Exhibits Nos. 3A, 3B, and 3C respectively, and received in Evidence.]

Q [By Mr. Adorno] Detective, with the use of the photographs would you show the court where the various stab wounds were on the defendant, I mean, on the victim, when you saw him that particular night. You may use the photographs and please address the court.

A There were a series of stab wounds about the body totalling eleven.

Stab wounds were located in the area of the upper abdomen. There were three additional stab wounds across the upper right area of the chest and around to the right side.

Q Do you have one of those photographs that depicts those particularly wounds to show to the court, please?

A Yes.

Q Will you show that to the court. You may continue, Detective.

A There was one single stab wound located on the left anterior line of the chest. There were three stab wounds on the right upper arm which is also in this picture, and then there were three additional stab wounds on the right side of the back.

Q Would you show the court those photographs that depict those particular wounds. Detective, let me show you what

has been marked as State's Exhibit 1-F for Identification. Do you recognize that particular exhibit?

A Yes, sir.

Q Does it truly and accurately depict the scene as you saw it on the 21st?

A Yes, sir, it does.

MR. ADORNO: The State would move into Evidence that exhibit at this time.

MR. TUNKEY: No objection.

THE COURT: It will be admitted.

[Thereupon, the photographs referred to were marked as State's Exhibit No. 4 and received in Evidence.]

Q [Mr. Adorno] Would you tell the court what State's Exhibit No. 4 depicts?

A It is a photograph of the bathroom area depicting a toilet in the bathroom of the victim's apartment. Inside

the toilet is located the cleaning brush with a handle being submerged, and inside of the toilet, submerged in the water, is a soaked pillowcase with bloodstains.

Q Let me show you now a series of three other photographs, State's Exhibits No. 1-H for Identification, I-G for Identification, 1-I for Identification, and may I ask you if you can tell the court whether you recognize those photographs?

A Yes, I do.

Q Do they truly and accurately depict the scene as you saw it on September 21, 1976?

A Yes, sir.

MR. ADORNO: The State would move those three exhibits into Evidence, Your Honor.

MR. TUNKEY: There has been no showing in connection with this case. I object.

THE COURT: Overruled. They will be admitted, A, B, and C, please. Put them in the next group.

[Thereupon, the photographs referred to were marked State's Exhibits Nos. 5A, 5B, and 5C, respectively, and received in Evidence.]

Q [By Mr. Adorno] Detective, would you tell the court what those three particular exhibits portray?

A Those are three photographs of the walls inside the victim's apartment depicting the writing that was located on those walls.

Q Sir, what this writing say basically?

MR. TUNKEY: Your Honor, I object. The pictures speak for themselves.

THE COURT: Sustained.

MR. ADORNO: I will hand them to the clerk so that the court can look at the particular photographs.

THE COURT: I see them.

Q [By Mr. Adorno] Detective, after looking or seeing the particular writing on the wall did you determine what the one possible motive might be in the killing of the Reverend Daniel Pridgen?

MR. TUNKEY: I object, Your Honor. This is speculation.

THE COURT: Sustained, sustained.

Q [By Mr. Adorno] Any fingerprints of value that you lifted from the scene at the time?

A Just a couple that were identified with the victim.

MR. TUNKEY: Objection, Judge.

Q [By Mr. Adorno] Were there any fingerprints found?

A Yes, sir.

Q And were any identified with the persons who subsequently were arrested?

MR. TUNKEY: Objection, Your Honor. He is not qualified.

THE COURT: Sustained.

Q [By Mr. Adorno] Did there come a time when you received information as to who committed the homicide of the Reverend Daniel Pridgen?

A Yes, sir.

Q When was that?

A On the 2nd of November, 1976.

Q Did there come a time when you first came into contact, when you first met David Leroy Washington?

A Yes, sir.

Q Do you see that individual in the courtroom?

A Yes, sir.

Q Would you point him out, please?

A Sitting to the right of Mr.

Tunkey.

Q When did you first come into contact with the defendant?

A On Firday the 5th of November, '76.

Q Where did you come into contact with the defendant?

A At the Dade County Jail.

Q Approximately what time did this initial meeting take place?

A Approximately 10:15 a.m.

Q Were you by yourself at that time?

A No, sir. Detective David Simmons was with me.

Q Was he also associated with the Homicide Section of the Dade County Public Safety Department?

A Yes, sir, he is.

Q Did you have an occasion to have a conversation with the defendant regarding the killing of the Reverend Pridgen?

A Yes, sir.

Q What time did that conversation take place, approximately?

A At approximately 3:10 p.m.

Q Where did that conversation take place?

A At the Homicide office.

Q Prior to you discussing the Pridgen homicide, were you present for the discussion of any other homicides that the defendant might have been involved in?

A Yes, sir.

Q In what homicide was that?

A The homicide of Katrina Birk.

Q Who is the lead investigator in

that particular homicide?

A Detective Simmons.

Q Prior to you or Detective Simmons having any type of conversation with the defendant, did you have occasion to read him the Constitutional Rights?

A Yes, sir.

Q Was that a written waiver of rights?

A Yes, sir.

Q Do you have your written waiver with you?

A Yes, I do.

Q Would you please pull it out of your case file and hand it to the clerk so that she may mark it for identification.

THE COURT: Any objection to this, Mr. Tunkey?

MR. TUNKEY: No, Your Honor. I might point out to the court that these exhibits have already been received by

the court at the time of the plea, and that includes the written and signed statement of the defendant.

THE COURT: I think for the purposes of this hearing counsel is attempting to introduce statements that were taken at that time.

MR. TUNKEY: I have no objection to incorporating the entire proceedings of last Wednesday into this record and the court taking that into consideration in passing sentence.

THE COURT: I had anticipated that the confessions are here and that they would be made a part at this time. If you want to go ahead we will put them in individual numbers so that you can keep your case order in some sequence. Just mark it with the Constitutional Rights form that was taken at that time.

Q [By Mr. Adorno] Detective,

at 3:10 p.m. on November 5, 1976, did you have occasion to have a conversation with the defendant with respect to the Pridgen homicide?

A Yes, I did.

Q And was this in an oral or written conversation?

A Oral.

Q How long did that oral conversation take place?

A Approximately an hour.

Q Did you take any notes during the taking of this particular statement?

A Yes, I did.

Q Did you incorporate that in your police report?

A Yes, sir.

Q With the use of your police reports and the written statements which were subsequently taken, please tell the court as best you can remember what you

might have said to the defendant and what the defendant might have said to you; try to limit yourself as best you can to the murder of the Reverend Daniel Pridgen.

MR. TUNKEY: Your Honor, the statement is in evidence. It certainly is the best evidence as to the exact conversation.

THE COURT: I think that counsel is able to bring in any other evidence that may not have been incorporated in the statement; of course, subject to your cross.

MR. ADORNO: I am only dealing with the oral statement, not the written.

THE COURT: Use your notes only to refresh your recollection if you need to.

Q [By Mr. Adorno] You may answer the question.

A Our conversation began with just how David Washington came to involve himself with the murder of Reverend

Pridgen. I wanted to find out from Washington in his own words just how long it had been planned, if it had been planned. So the conversation began in that area. David Washington told me that he and Johnnie Mills, having been friends for quite some time, had been hanging around together over the weekend prior to the homicide. Mills approached David Washington and told him about the Reverend Pridgen and that the reverend was a homosexual and that he also worked up at the laudromat and would probably have a good sum of money from the laudromat. So David Washington decided that he was going to get with Mills and make up a plan to go over to Reverend Pridgen's apartment, and using his homosexual tendencies, make up a plan to rob him.

However, David Washington also told me that he had already made it up in

his mind that he was going to kill Reverend Pridgen regardless of whether they got any money or not because he was a homosexual and he did not like the idea of a homosexual being in the church, and in David Washington's words "hiding behind the cloth."

So, David Washington, along with Johnnie Mills decided that that Monday evening, around 10:30, Mills would make an appointment to go by Reverend Pridgen's apartment to engage in these sexual activities. This went according to plan. Washington, however, went with Mills over to Pridgen's apartment. Washington had with him a hunting knife. He called it a Jim Bowie knife, which he had borrowed from a neighbor boy the previous Sunday. He had told the neighbor boy that he just wanted to mess around with it. But he, in fact, had borrowed the knife with the

intent and the plan to use that to kill Reverend Pridgen.

At about 10:30 p.m., Monday evening, Johnnie Mills and David Washington went around to Pridgen's apartment. They knocked on the door. They were admitted by the reverend. Washington said that Reverend Pridgen appeared to be somewhat surprised to see that there were two people when he had only expected Johnnie Mills and David Washington went in to the victim's apartment and sat down and they engaged in some idle conversation for perhaps five or ten minutes.

Then Washington excused himself and said that he had to leave. This was also according to the plan. Washington then left the apartment, walked to the corner of that structure that the apartment is located in, and waited for a couple of minutes for Mills to begin to

engage in this homosexual activity with Reverend Pridgen. The reverend had taken his clothes off and had gotten into the bed and the lights were turned off.

So Washington moved up to the front door of the apartment so that he could be in closer range to hear the coughs that Johnnie Mills was supposed to signal him when he had Pridgen, Reverend Pridgen in bed.

When Washington heard Johnnie Mills cough two times, loudly, he had placed some gloves on his hands which he had also brought with him, and then he immediately entered the apartment through the front door which was unlocked, went directly over to the bed and began stabbing Reverend Pridgen.

David Washington said that he thought that he had cut Mills at one point but later found out that he had not, the

reason being there was dark inside the apartment except for a small lamp that was on.

After he stabbed the Reverend Pridgen, immediately, David Washington then got up and turned the light on where they saw better. He kept telling Johnnie Mills to be sure and hold the pillow Reverend Pridgen's head face so that the reverend would not cry out or make any noise to alert any of the neighbors.

After turning the lights on, David Washington observed that the Reverend Pridgen was still alive and that he was still wiggling on the bed. He again told Johnnie Mills to be sure and hold the pillow down over Reverend Pridgen's face. He watched for perhaps one, perhaps two minutes until Reverend Pridgen stopped wiggling. He was satisfied that the reverend was dead. He and Johnnie

Mills then proceeded to begin to ransack the apartment in search for monies.

After Johnnie Mills had gotten up off the bed, David Washington observed that there was some blood on the pillowcase that Mills had been holding over the reverend's face. He felt that this blood appeared to be a print from Mills, a handprint. He wanted to be sure that there would be no evidence to trace so he took the pillowcase into the bathroom where he used a cleaning brush handle to submerge it in the water so as to distort the blood print.

Q Was that the condition you found the pillowcase when you arrived at the scene on September 21, 1976?

A Yes, sir.

Q Continue.

A David Washington then returned to the living room and the bedroom area of

this apartment where had and Johnnie Mills continued searching for some money. He stated that Johnnie Mills was making a lot of noise and kept having to tell him to to hold it down and keep quiet and not make so much noise, and then took a pink spread and covered one of the windows with it because he was afraid with the noise that Mills had been making that a neighbor might perhaps look over and he didn't want anybody to see them inside.

Then he continued looking for money. They couldn't find any of the money very easily. Finally, in the upper right-hand drawer of the desk there that was over by the couch, he found a wallet that belonged to the reverend. Washington had taken his gloves off for a moment and in going through the wallet, he had touched some of the identification. He didn't

want to take a chance on the police being able to lift fingerprints from this identification, and these paper items that he had touched while he had the gloves off, so he took those with him when he subsequently left the apartment.

He ended up tearing them up into small pieces and scattering them about the streets, four or six blocks from the scene, and he said that he believed that he may have burned some of the paper items also.

Then he put his gloves back on and continued to search for some money. In this same drawer that he found the wallet in, he found a couple of rings. He said that one of the rings appeared to be similar to a Masonic ring. He took two of the rings from the drawer. He also found a watch which he took and also in the same drawer, he found a .22 caliber

chrome-finished revolver with a two to three inch barrel that had some black tape wrapped around the handle. This he also took from the Reverend Pridgen's apartment.

After finding these articles and going back over areas that Johnnie Mills had touched, and also telling Mills to do the same in wiping them so that there would not be any fingerprints left, then Washington decided he would write some phrases on the walls because he wanted the community and people around the neighborhood to know that Reverend Pridgen was a homosexual.

He also felt that by writing this on the wall that when the police began to investigate the murder that they would be thrown off of the trail leading to David Washington and to Johnnie Mills because we would think that there was a

homosexual involvement that killed Reverend Pridgen.

I asked David Washington if he is a homosexual and he stated that he is not. I asked him if Johnnie Mills was a homosexual. He said that Johnnie Mills is not really a homosexual, he doesn't feel.

However, Johnnie Mills, being a drug addict, associates a lot with homosexuals in order to obtain money to support his habit.

I asked David Washington how long they stayed at Reverend Pridgen's apartment. He said that it was around 12:30 to 1:30 a.m. that Tuesday morning before they left the apartment, the reason being that they were determined to try to find some money inside the apartment and they continued searching and ransacking the apartment and they also wanted to be sure that it was late enough

that nobody of the neighbors could possibly see them leaving.

At about 12:30, 1:30 a.m., when they did leave the apartment, they decided to take Reverend Pridgen's car, mainly because they felt that possible there would be some money in the trunk of the car if they had not found a large amount in the apartment.

They were able to find something in the neighborhood of \$80.

So he took Reverend Pridgen's keys, told Johnnie Mills to wait while he went out to the car, and opened the passenger door for Johnnie Mills, and then signaled for Mills to come out and get into the car. Once Mills got into the car he instructed Mills to be sure not to touch any areas or surfaces inside the car. He then got into the car and he drove it from Reverend Pridgen's apartment directly

to his home where he took the gun inside his house and then went back to the car, started to go into the trunk and discovered that the trunk lock had been punched out, and he didn't want to take the time that would have been required to open the trunk by force.

So then he told Mills to come with him and "Let's go for a ride." He then left his house and drove up to 77th Street and 27th Avenue Northwest, which is approximately a half-block south of Lazier's Lounge, which was their destination. There is a car lot located on the southeast corner of that intersection which is where David Washington parked Reverend Pridgen's car.

I asked David why he chose this particular location to abandon the car. He said that the reason for leaving the car on the side of the car lot was that he

felt that the people who run the car lot would see the vehicle there and after a couple days would think perhaps that it had been abandoned, and they might even pull the car onto the lot, perhaps paint it, perhaps try to sell it.

David Washington said that each day after the car had been abandoned, he continued to go by the car lot to see if the car would be pulled into the lot, and if it were to be pulled in, he would anonymously call the police and try to throw some suspicion on the people at the car lot for having the victim's car.

Q Did you ever recover the reverend's car?

A Yes, sir.

Q Where was it recovered?

A On the south side of the car lot at 77th Street and 27th Avenue,

Northwest.

Q What happened then?

A After abandoning the Reverend Pridgen's car, David Washington and Johnnie Mills walked over to Lazier's Lounge. David still had the hunting knife with him. However, he took it out and placed it alongside the building of the lounge, he didn't want to take it inside.

Then he and Johnnie Mills went into the lounge. I asked David Washington if he had had anything to drink while he was in the lounge. He said that he doesn't drink alcoholic beverages.

I also asked him if he uses narcotic drugs and he said he does not.

I asked him if he was under the influence of any alcohol or narcotic drugs at the time of the murder. He said he was not.

He said they stayed at Lazier's

Lounge for perhaps five minutes. Then they left and walked back to his home at approximately 65th Street and 29th Avenue. He said that on the way from Lazier's Lounge to his home, he took the key ring which had several keys on it, including the keys to the reverend's car, took them off individually and threw them alongside the road in people's yards, in vacant lots, between Lazier's Lounge and his house. He also picked the knife back up from alongside the building and took it with him down to approximately 73rd Street and 27th Avenue while walking home where he threw it into a field.

Q Anything else that you can remember about the oral statement which began at 3:10 p.m. on November 5, 1976?

A I asked him what he did after he got back home from Lazier's Lounge. He said he just sat up for little while

thinking about what had happened. Then he retired for the evening.

Q What time did the oral statement conclude?

A Approximately 4:10 p.m.

Q What, if anything, did you do after that?

A I took a formal written statement from David Washington covering the same area the oral statement had. While I was taking the oral statement from David Washington, he was given a sandwich and a drink and ate while we talked.

MR. ADORNO: Judge, I believe we have a stipulation that the exhibit--

THE COURT: Yes, sir. It has already been received, his statement. I do not know what the number is.

[Thereupon, the document referred to was marked as State's Exhibit No. 6 and

received in Evidence.]

Q [By Mr. Adorno] Detective Major, was the defendant given an opportunity to read the statement, State's Exhibit No. 6, a copy of the original?

A Yes.

MR. ADORNO: Excuse me. Would you make that a Composite No. 6 with the Rights Form in the statement. Thank you.

[Thereupon, the document referred to was re-marked as State's Composite Exhibit No. 6 and received in Evidence.]

Q [By Mr. Adorno] Did the defendant make any corrections that he felt were necessary to accurately reflect what had happened on that night?

A Yes, sir, he did.

Q Prior to beginning the oral

statement at 3:10 p.m. on November 5, when you initially contacted the defendant with the accusations involved in the Birk and Pridgen homicide, did he admit or deny it?

A He denied it.

Q Did there come a time when he changed his mind?

A Yes, sir.

Q And would you tell the court the circumstances about the defendant changing his mind as to his involvement in the Birk and Pridgen homicide?

First of all, when did that conversation--

MR. TUNKEY: Judge, I will object to this. This is inappropriate. The State is knowingly and intentionally commenting upon the defendant's rights under the Fifth and Fourteenth Amendments to remain

silent. We would move to strike this.

THE COURT: Overruled.

Q [By Mr. Adorno] When did that conversation take place?

A The initial conversation took place between 10:45 and approximately 11:45 a.m.

Q Did that also take place in the Homicide Office?

A Yes, sir.

Q Was Detective Simmons also present?

A Yes, Sir.

Q Would you tell the court the circumstances in the conversation that took place at that time?

A After advising David Washington of his rights per the Miranda decision. I advised David that he was suspected of both the Revered Pridgen's murder and Katrina Birk's murder; introduced myself

as the lead investigator on the Pridgen homicide and Detective Simmons introduced himself as the lead investigator on the Birk homicide. We informed David that the investigation was still continuing and that evidence would be worked that would would prove that he in fact did kill Reverend Pridgen and Katrina Birk, and there was no reason for him to attempt to lie to us.

We informed that we spoke to Johnnie Mills and that we had learned from Johnnie Mills of David's involvement; that Mills was telling us that David had told him about the murders.

Q What reaction, if any, did you observe on the defendant, either by speech or by sight?

MR. TUNKEY: Objection. It is immaterial and irrelevant.

THE COURT: Overruled.

A I believe he grinned a little bit and said that Johnnie Mills was lying to and that Johnnie Mills was there also in that he took part in the Bridgen homicide.

Again, I asked David Washington if he was willing to come forth with the truth about this, these two murders, and he said that he would tell us about how the murders took place; why they took place.

He did ask one thing of us, that he be permitted to speak with his wife before the news was released and we advised that although we couldn't make any promises to him, we would do our utmost to have her brought down to the Homicide Office so that he could speak with her before the press releases were made.

Q Were you able to comply with that request before the defendant was formally booked into the Dade County Jail?

A Yes, sir.

Q Did he get an opportunity to speak to his wife on November 5, 1976?

A Yes, sir.

Q What time was he booked into the Dade County Jail?

A We took him back over to the jail at 10:00 p.m.

Q Did you have occasion to see him on November 6, 1976?

A Yes, sir.

Q And at approximately what time and where did that meeting take place?

A It was in the early evening. I believe it was around 8:00 p.m.

Q Sir, what was your purpose for being in the Dade County Jail to see the defendant?

A Myself and Detective Simmons went over to the Dade County Jail to see David Washington, and asked him if he'd be willing to accompany us on location to point out areas that he had disposed of evidence as he related to us in both oral and written statements, that being the murder weapon in the Pridgen homicide, and the other evidence in the Katrina Birk

murder.

Q Did he comply and take you and Detective Simmons on location at a subsequent time?

A Yes, he did.

Q During that meeting of November 6, 1976, did you have a conversation to ask the defendant anything concerning the Frank Vincent Meli homicide?

A Yes, I did. During our conversations, of course, we would ask questions of David Washington in regard to each of these three cases, and in trying to understand David Washington a little better, I asked him why he committed these murders.

He said that one of the reasons was that he wanted to get money for his children, for his wife. So I asked him how he expected his children to eat the motorcycle that he purchased with the

monies that he got from the Frank Meli murder.

He again grinned and told me that he knew where I was coming from, and he had never had anything and he felt that this was just a little bit of something for himself also, and that he had given some of the money to his wife and children, and that the motorcycle was just something for him and that he had never had anything and he would later use the motorcycle for transportation if he could get a job.

MR. ADORNO: Thank you. No further questions.

THE COURT: Any cross, Mr. Tunkey?

MR. TUNKEY: May I have a moment, Judge?

THE COURT: Yes, sir, of course.

CROSS EXAMINATION

BY MR. TUNKEY:

Q Detective Major, how much time went by between your initial contact with Mr. Washington and the time that he gave you the statements concerning the Pridgen and Birk homicides.

A Are you referring to the oral statements, sir, or the written statements?

Q Oral.

A An hour before we start making the first statement.

Q Did he see his within an hour or speak with his wife during that hour?

A No, sir.

Q How much time did he spend with you on November 6 when you went out, presumably, in a detective car, you and David Washington and Detective Simmons?

A Perhaps an hour.

Q Who was in the car with you besides Simmons and David Washington?

A We were the only three in our vehicle and we had two unmarked backup vehicles with one man in each one of those.

Q Did he ever try to escape?

A No, sir. He was handcuffed.

Q Well, in spite of the fact he was handcuffed, did he try to escape?

A No, sir.

Q Was he cooperative?

A Yes, sir.

Q Did you ever ask David Washington to take a polygraph test?

A No, sir.

Q Did he ever offer to?

A I don't recall him offering to take one, no.

Q As I understand it, he freely told you of his participation in three separate homicides?

A Yes.

Q When he gave you these statements, he never acted in any fashion such as to indicate to you that he was bragging of his participation in these things, did he?

A No, sir.

Q Did he seem remorseful?

A I couldn't answer that with a yes or no.

Q Why?

A Because each case is different.

Q All right. Without regard to the Pridgen homicide, did he seem remorseful as to the other two, the Birk and the Meli incidents?

A Somewhat.

Q Do you feel that David Washington is intelligent?

A Yes, sir, I do.

Q Do you feel that he has abilities that could be channeled into useful

MR. GERSTEIN: Object to this, Your Honor.

THE COURT: Overruled. You may answer, sir.

A I don't know if I can answer that.

Q [By Mr. Tunkey: You just told us he was intelligent.

A Yes, sir.

Q My question to you is, do you feel he has the ability to channel his life or what remains of it into useful activities?

MR. GERSTEIN: The basis of my objection, if Your Honor please--

THE COURT: Lack of qualification. I understand. He can answer that.

MR. GERSTEIN: He said he isn't able to.

THE COURT: Yes, that is his answer.

Q [By Mr. Tunkey] Is that your answer?

A Yes, Sir.

MR. TUNKEY: I have no further questions.

REDIRECT EXAMINATION

BY MR. ADORNO:

Q Was he remorseful with respect to the Pridgen homicide?

A Was he?

Q Yes.

A No, sir.

Q What was his reaction as to the Pridgen homicide?

A His reaction was he did what he set out to do. He took Reverend Pridgen's life because he was a homosexual and he didn't belong in the church and didn't belong alive.

Q When you first confronted the defendant with evidence in the Birk and

and the Pridgen case, he initially denied any involvement.

MR. TUNKEY: Objection, again, Your Honor.

THE COURT: Overruled.

Q [By Mr. Adorno] And he only told you about those two homicides after you confronted him with the fact that Johnnie Mills had told you and Detective Simmons that defendant was involved.

A Yes, sir.

MR. ADORNO: Thank you. Nothing else.

MR. TUNKEY: No questions.

MR. ADORNO: Judge, may the detective stay in the courtroom now that he has testified?

MR. TUNKEY: I don't object.

MR. ADORNO: Would you ask Dr. Fernandez to step in, please.

Judge, the doctor needs to be

sworn in. He was not here when the other witnesses were sworn.

the court; Any objection as to the stipulation relative to the doctor's qualifications?

MR. TUNKEY: I will stipulate that the doctor is a forensix pathologist.

THE COURT: I thank he is a member of the staff of the County Medical Examiner.

Thereupon:

ELIDIO C. FERNANDEZ

was called as a witness on behalf of the plaintiff and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ADORNO:

Q State your name and what your official duties are.

A Elidio C. Fernandez. I am an associate medical examiner with the Dade

County Medical Examiner's Office.

Q Dr. Fernandez, did you have an occasion to perform an autopsy on the Reverend Daniel Pridgen on September 22, 1976?

A Yes, I did.

THE COURT: Would counsel stipulate that I can have a copy of the protocol for the purposes of following his testimony?

MR. ADORNO: Yes, sir.

THE COURT: Any objection?

MR. TUNKEY: No, sir.

THE COURT: Because it does aid the court if I have a copy. I have no objection if you want to go ahead and make a copy, mark it as an exhibit.

MR. TUNKEY: I agree.

THE COURT: Just give it the next number.

[Thereupon, the exhibit

referred to was marked and received as No. 7.]

Q [By Mr. Adorno] Doctor, did you have an occasion to perform an autopsy on the Reverend Pridgen?

A Yes, sir, I did.

Q Would you tell the court what your external examination revealed?

A Yes. It revealed the presence of multiple stab and incised wounds.

Q Sir, would you describe the location of those wounds for the court; it might be easier if you might stand up and point them out on your body. The judge has already had the opportunity to look at the photographs.

A Well, most of the stab wounds and the incised wounds were in the torso. There was one on the right upper anterior chest at about this location.

Q Indicating, for the record,

right upper chest?

A Right.

There was one on each left and right lateral aspect of the chest at about the mid-axillary line. There is an imaginary line running here. There were three in the right upper abdomen. There was one on the right lower back and there were three in the right arm.

In addition to these there were other smaller incised superficial wounds in the front lateral aspect in the back of the torso.

Q Did you conduct an internal examination the deceased?

A Yes, I did.

Q And were you able to determine whether any of the stab wounds punctured any organs?

A Yes, I did, and they had punctured several organs?

Q Which particular wounds were they and which organs did they puncture?

A I would have to refer to--

THE COURT: Go ahead, sir, use this as an exhibit to refresh your recollection.

A The one wound on the upper anterior chest which was about four inches below the top of the shoulder, penetrated the right chest cavity and lacerated the right upper lobe of the lung.

The wound on the right lateral chest wall at the mid-axillary line also penetrated the right chest cavity and lacerated the lower lobe of the right lung.

The wounds in the right upper abdomen, number three that I described, together lacerated the liver and several of the small intestinal lobes and large bowel lobes as well as the aorta.

The aortic laceration was a

rather small nick in the wall of the aorta. The wound located in the right lower back also penetrated the cavity and injured the diaphragm and the liver.

The wound located in the left lateral chest at the mid-axillary line also penetrated the left chest cavity and lacerated the left lung.

Those on the right arm went through the soft tissues of the area.

Those are essentially the penetrating ones in the organs that were injured.

Q Of all the wounds, Doctor, that you found how many do you consider to or would have been fatal?

A The wounds on the torso that penetrated the cavities would have been all potentially fatal and the number of those, I think, is seven.

Q Doctor, would any of those

wounds, any of those seven wounds, have caused instantaneous death?

A Not instantaneous death, no.

Q Approximately how long within reasonable medical certainty would it have taken the victim to die taking into account these wounds that you found both by the external and internal examination of the Reverend Pridgen?

MR. TUNKEY: I will object unless the question is given as to medical--

THE COURT: Okay, go ahead.

A I would roughly approximate it that it would have taken probably minutes for him to die.

Q [By Mr. Adorno] What was the cause of death?

A The cause of death was bleeding, internal bleeding. He had a significant amount of blood in the abdominal cavity as well as both chest cavities.

Q In other words, his lungs got full of blood.

A Right. The cavities where the lungs are contained, and I also assume that he must have bled some externally.

Q How much force would have been necessary, Doctor, in order to inflict the wounds that you found on the Reverend Daniel Pridgen?

A I would say insignificant force, enough to penetrate the chest in the abdominal walls.

MR. ADORNO: Thank you. Nothing further.

MR. TUNKEY: No questions.

[Witness excused.]

MR. ADORNO: Your Honor, may I be excused for two minutes. I have to bring down Mrs. Pitzer. She is waiting in my office.

THE COURT: Go ahead.

[Thereupon, a recess was taken after which the following proceedings were had:]

THE COURT: All right, counsel, take your witness, please.

Thereupon:

RUTH MARIE PITZER

was called as a witness on behalf of the plaintiff and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ADORNO:

Q Mrs. Pitzer, will you state your name?

A Ruth Marie Pitzer.

Q Mrs. Pitzer, how old are you?

A I am 69.

Q Where do you live?

A Indiana.

Q Drawing your attention to

September 21, 1976, did you have an occasion to come down here to visit anybody in Miami?

A Yes, I did.

Q Who were you coming to visit?

A We were coming to see our sick brother and we stayed with my sister-in-law.

Q What is her name?

A Kay Birk.

Q Did you come down by yourself?

A No. My two sisters came along.

Q And what are their names?

A Mrs. Julia Sullivan and Mrs. Georgia Griffith.

Q Did you stay with your sister-in-law, Kay Birk, on Tuesday, September 21?

A Yes, we did.

Q How about Wednesday?

A Yes, we did.

Q How about Thursday?

A Yes, we did.

Q Were you at your sister-in-law's house the night of September 23, Thursday night?

A Yes, I was.

Q And were your two sisters and Kay also present?

A That's right.

Q What were you all doing that evening?

A We were watching the television, the debates between Jimmy Carter and the president.

Q Did there come a time when something unusual happened that evening?

A Yes.

Q Would you tell the court what was the first thing that you observed?

A The screen door was pulled open and it made a loud noise, and this fellow

came in waving a gun. I screamed. No one else did. But he said if we keep still and do like he said we wouldn't be hurt.

Q Did you notice whether the individual who came in through the door had any type of disguise?

A I beg your pardon?

Q Did the individual have any type of disguise?

A Yes

Q What was that?

A He had strips of material tied around his face three or four different places.

Q Once he got into the house and he told you to do what he told you, and that he wouldn't hurt you, what happened after that?

A He told them all to lay down on the floor.

Q Did your sister, Mrs. Griffith, lay down on the floor?

A Yes.

Q How about Mrs. Sullivan?

A Yes.

Q Did you lay down on the floor?

A No. My sister-in-law told him that I had Parkinson's disease and I couldn't get down on the floor.

Q And where did he leave you?

A He said I could sit in the chair.

Q Did your sister, Kay Birk, sister-in-law, Kay Birk, was she also told to lie down on the floor?

A Yes.

Q Did there come a time when your two sisters and your sister-in-law were tied, their hands were tied?

A Yes.

Q Were you able to tell how

Mrs. Griffith's hands were tied?

A They were tied behind her back.

Q How about Mrs. Sullivan?

A He tied hers in front.

Q Did there come a time when you observed your sister-in-law, Kay, take the individual who broke into the house into the kitchen?

A Yes.

Q What were you able to see?

A She took a can that contained money and put it on the table and told him he could have it.

Q Then what happened?

A Well, he asked about the purses but I think he was going to look through those later, and he came back in the room and that's when he tied Kay.

Q Then what happened after he tied Kay?

A Well, I heard him shoot.

Q How many gunshots did you hear?

A I heard him shoot three times.

Q Did you see him shoot Kay Birk?

A No.

Q Did you seen him shoot Georgia Griffith?

A No.

Q Did there come a time after you heard the gunfire that you saw a knife?

A Yes.

Q What were the circumstances when you first saw the knife?

A He was standing between me and Julia, and he took this knife and held it up and wiped it off.

Q Do you remember how long the knife was?

A It seemed to be about 14 inches long.

Q Did there come a time when you saw any blood coming from your sister,

Georgia Griffith?

A Yes.

Q Where was that blood coming from?

A The blood was on her right shoulder in the back and it was about seven inches across where the blood was running through.

Q Did there come a time when you were shot?

A Yes.

Q Would you tell the court as best as you can remember, Mrs. Pitzer, what happened just before you were shot?

A Well, I knew I was going to be next, and I said, "Please don't shoot me," and he put the gun to my head and shot me.

Q Ma'am, do you still have a scar where you were shot?

A Yes, right there.

Q Would you please turn around to

show the court?

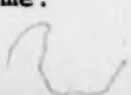
After you were shot, what do you remember happening next?

A Well, my eyes started swelling up, and it got so big I couldn't hardly put my hand over it, and I thought my eyeball was going to burst but it just hurt.

Q Judge, indicating where she indicated the scar was, it was in the center of her forehead.

Mrs. Pitzer, right after he placed the gun to your forehead and he fired the shot, did he push you or kick you or in anyway touch you?

A I was on the chair and he threw me out of the chair. It was a swivel chair. Then he put the chair on top of me, and Julia was next to me and she was conscious, and she took the chair off of me.



Q Were they able to get all of the projectile of the bullet that entered your forehead?

A No.

Q Where are the remains of the bullet, the fragments?

A Well, it's still in my head. They X-rayed it after surgery, a couple of days, and they said they couldn't get all of it, and he said the that part of the brain--

MR. TUNKEY: I will object, Your Honor. This is hearsay.

THE COURT: Sustained.

MR. ADORNO: I believe she can testify as to her own injuries.

THE COURT: She can if she has seen it by X-ray but not by what somebody else has told her, Counsel. I have sustained it.

Q [By Mr. Adorno] Have you

suffered any permanent injury or disability as a result of the gunshot wound to the forehead?

A Yes.

MR. TUNKEY: I will object to this. We pleaded to it.

THE COURT: I think for the purposes of this hearing, we can hear it. Go ahead. You may answer.

A I am blind in my right eye.

Q [By Mr. Adorno] Mrs. Pitzer, after you fell on the floor, do you remember being stabbed?

A No.

Q Did there come a time when you found out and you discovered you had in fact had been stabbed?

A Yes.

Q How many times or how many stab wounds did you find once you recovered in the hospital?

A One.

Q Where is that stab wound?

A On my side.

Q Did you see the individual
leave the house?

A No?

Q Did there come a time when you
saw you sister, Mrs. Sullivan, crawl to
the bedroom and contact the fire rescue
and the police?

A Yes.

Q Is Mrs. Sullivan here with you
today?

A No.

Q Where is she?

A She is in a nursing home. She
has been in a coma ever since it happened
and no one has been able to reach her.

Q She has been that way since the
night of September 23, 1976?

A That's right, she can't get well.

Q At any time, including that evening, did you offer any resistance at all to this individual?

A No.

MR. TUNKEY: Objection, leading.

Q [By Mr. Adorno] Did you hear anyone else offer any resistance whatsoever toward the individual?

A No, I didn't.

Q At the time that you were shot on the forehead, were you seated?

A Yes.

Q Did you make any advances, anything whatsoever toward this individual?

A No.

Q Other than just sit there.

A No.

Q Mrs. Pitzer, do you think you can identify the individual if you ever saw him again?

A I think so.

Q Look around the courtroom, if you wish, it is not necessary, but do you see the individual, and if you do, please point him out. If not, tell the court that you cannot.

A Well, I can't see who it is unless it would be him. It was about his size.

Q Indicating for the record, the defendant.

MR. ADORNO: No further questions.

MR. TUNKEY: No questions.

[Witness excused.]

THE COURT: Call your next witness, Counsel.

MR. TUNKEY: Your Honor, if this is the sister of Mrs. Pitzer, I will stipulate that her testimony is going to be cumulative to that of Mrs. Pitzer. I will stipulate that if she was to testify, she would testify to substantially the

same thing. It is cumulative. I object to it.

THE COURT: Overruled. Go ahead.

Thereupon:

JULIA SULLIVAN

was called as a witness on behalf of the plaintiff and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ADORNO:

Q Mrs. Sullivan, if you will speak right up into that microphone when I ask you the questions and then everybody will be able to hear you.

Please state your name and age.

A Julia Sullivan--this scares me. I guess I am too close. Julia Sullivan, 73.

Q Mrs. Sullivan, did you have occasion to come down to Miami in September, September 21, 1976?

A I did.

Q Did you come down with Mrs. Pitzer, your sister, and Mrs. Griffith, your other sister?

A Yes.

Q How old is Mrs. Griffith?

A Sixty-eight.

Q Did you have occasion to stay with your sister-in-law, Kay Birk?

A I did.

Q Were you down here to visit your brother who was in the hospital at that time?

A Yes.

Q Did you stay with them on Wednesday and Thursday of that week?

A Yes.

Q On Thursday evening what were you doing?

A We were listening to the Carter and Ford debate.

Q Were your two sisters and your sister-in-law in the house?

A Yes. We were all in the front room.

Q Was there anybody else other than the four of you watching the debate?

A No.

Q Did there come a time when something unusual happened?

A Yes.

Q Tell the court what happened.

A Well, just all of a sudden it sounded like that he ripped the screen and jumped in just like a flash.

Q Did you say anything at that time?

A Yes.

Q What did you say?

A I said, "Praise the Lord."

Q Why did you say that?

A Because I believe--I am a

Christian and I believe in Jesus Christ, and when I said, "Praise the Lord," I was turning the affair over to him, for him to take charge.

Q When you saw him come in the house, did you notice anything in either of his hands?

A Yes. I seen the gun.

Q Was he wearing any disguise?

A Yes.

Q What type of disguise did you observe?

A Well, it looked like ribbons or pieces of material about this wide, one tied across here and one across here and one across here.

Q Indicating for the record, one across the forehead, one across the bridge of the nose and one below the lips around the chin?

A That's the way I remember it.

Q Do you remember what he said after he came into the house?

A Well, he said if we--I don't remember just exactly--not to make a fuss or anything, but he wanted us to do as he wanted to do, and for us--that he wouldn't, I understood, not hurt us.

Q Did there come a time when he told you to lie down on othe floor?

A Yes.

Q Did you, yourself, lie down on the floor?

A I did.

Q What was your position on the floor? In other words, were you on your back or side or stomach?

A More on my side.

Q Did he ever tie your hands?

A He did.

Q How did he tie your hands?

A Well, he had a thin rope and he tied, he wanted to tie them in back of my back, and I hate to admit that I am getting old, but I said I didn't know whether I could get both of my hands back of my back or not, and he said okay.

Q Did he tie them in the front?

A Yes.

Q Was anybody else lying on the floor besides you with their hands tied?

A My sister, Georgia.

Q And where were her hands tied?

A I didn't see them but in the back.

Q Were you able to see your sister, Mrs. Pitzer, once you were told to lie down on the floor?

A Yes.

Q Where was she?

A She was sitting in a chair.

Q How about your sister-in-law, Kay Birk?

A Well, I seen her lying on the floork too, and her hands were tied in the back.

Q Did there come a time when you saw your sister-in-law, Kay Birk accompany the defendant into the kitchen?

A I did.

Q What happened in the kitchen?

A Well, I don't know what all happened out there, but I did see him--she said she would get him--get him her money, and I could see the cupboard. She got a chair and climbed to the top shelf and took out what looked like a china, I don't know whether a cream pitcher or sugar bowl or something, and gave it to him, and then he stepped back and looked up and down to see whether he could see anything else in

there. Now, that's superstitious, I mean, adding that. He was wondering, I think, what else he could see in there.

Q Did there come a time when you heard gunshots?

A Yes.

Q Did you see this individual shoot any of your two sisters or your sister-in-law?

A I seen him shoot my sister, Ruth.

Q Did you see him shoot anybody else, either Julia or--

A I am Julia.

Q Excuse me. Either Georgia or Kay?

A No.

Q Did you see the individual stab any of your two sisters or your sister-in-law?

A I seen him stab Kay.

Q Do you remember was it more than once that you were able to observe him stab Kay?

A It seemed to me like numerous times.

Q Where was Kay when she was being stabbed?

A To my right, not very far, not much farther than this table.

Q Indicating for the record, about one to two feet.

Was she standing or lying down or bending down while she was being stabbed by this individual?

A She was standing and he stabbed her until she fell.

Q Did you hear any gunshots immediately after seeing your sister-in-law, Kay, fall to the floor?

A No.

Q Did there come a time when you

were shot?

A Yes.

Q Would you tell the court what ahppened just immediately before you being shot.

A Well, my sister was shot, and, of course, he was going around the room shooting, and I wondered at the time just how I'd feel and what effect it would have on me when I was shot, when he came in to shoot me.

Q Where were you shot?

A In the back of my head; on top of my head.

Q Indicating for the record, right in the very back?

A No. It's right here on top. I have got a double crown, I guess.

Q Did you feel the barrel of the gun to the back of your head?

A I don't know whether I felt it.

I felt when it happened. It was a stinging effect.

Q What happened to you right after you were shot in the back of the head?

A Well, then he went to my next sister.

Q Did you lose consciousness?

A No.

Q Do you remember being stabbed?

A No.

Q Did there come a time when you found out in fact that you had been stabbed?

A I knew I was stabbed but I just don't know exactly what time it was.

Q How many times were you stabbed that evening?

A I was stabbed five times and it went into my lungs and my lungs are not healed yet today, and they put a tube

in me, fourteen inches long, and bigger than my thumb, at the hospital and had holes in it, and I have been doctoring, and if I asked to come down two weeks ago, I couldn't have come, but I am better now.

Q Mrs. Sullivan, when you were shot in the back of the head were you lying down on the floor?

A I was.

Q Were your hands tied?

A Yes. Well, that's one thing I can't swear to because I think they were. I would say they were.

Q Did you offer any resistance whatsoever?

A No.

Q And when you were stabbed the five times, do you remember offering any resistance?

A No.

Q Were you lying down?

A I was.

Q Did you see the individual flee the house?

A I didn't see him flee the house but I seen him go out the door into the kitchen.

Q Did there come a time when you were able to crawl across the living room and into the bedroom and call the police and fire rescue?

A Yes.

Q How many days were you in the hospital here in Miami?

A Twelve.

Q Were you transported to a hospital and received treatment up in Indiana?

A No, I didn't. They didn't put me in the hospital up there.

Q Your sister, Mrs. Griffith, where is she today?

A She is in a convalescent home in Indiana.

Q What is her physical condition as of today?

A She is a vegetable. She doesn't know nothing. The doctor says that she will not be able to know anything.

MR. ADORNO: Nothing further.

CROSS EXAMINATION

BY MR. TUNKEY:

Q Mrs. Sullivan, you stated that you are a Christian. I ask you if you are able today to forgive this person who committed these acts on you and your family?

A I forgave him that night. I mean, I forgave him. I prayed. The bible says to give thanks for everything and I prayed for his soul, and when he gets the

death penalty I hope that he has a chance to accept the Lord before that time. It would be wrong for me to have any resentment against him.

Q Mrs. Sullivan, how is it that you know that David Washington is going to get the death penalty?

A Well, I was told that he was. The jury gave that.

Q Who told you that?

A I think it was in the paper.

Q If, in fact, that is inaccurate, that no sentence has been passed at this point---

A Well, it's my fault. I mean, that's what I---

Q That's what you gleaned from what you read?

A Yes.

Q My question to you is this:
"Do you believe that David Washington is

going to have to be penalized by God's laws or by man's?

MR GERSTEIN: I would object to this. It is argumentative.

THE COURT: Sustained.

MR. TUNKEY: That's all.

MR. ADORNO: Nothing further.

Thank you, Mrs. Sullivan.

THE COURT: One lawyer, per witness, please.

[Witness excused.]

Thereupon:

DAVID L. SIMMONS

was called as a witness on behalf of the plaintiff and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ADORNO:

Q State your name, please, and your official position.

A David L. Simmons, Police Officer

with the Dade County Public Safety Department, Homicide Section.

Q How long have you been with the Homicide Section?

A Two years.

Q And how long have you been a Policar Officer with the Public Safety Department?

A About four years.

Q Did you have occasion to become involved in an investigation into the homicide of Katrina Birk and the attempted murder of Julia Sullivan, Georgia Griffith and Ruth Pitzer?

A Yes, I did.

Q What were your responsibilities in regard to that investigation?

A I was in charge of the investigation.

Q You were the lead detective in that case?

A Yes, I was.

Q What was your first involvement with that case?

A Well, on September 23, 1976, at approximately 11:30 p.m., I was contacted by my supervisor, Sergeant James Duckworth who advised me to proceed to the victim's residence, located at 10351 Northwest 28th Avenue.

Q [BY THE COURT] Give me the date and time again, please.

A September 23, 1976, at approximately 11:30 p.m. I then proceeded from the Homicide Office to the scene, arriving there at approximately 11:45 p.m.

Q [By Mr. Adorno] Would you describe the premises that you went to to the court, please.

A The premises consisted of a residence, a three bedroom residence, located on the east side of Northwest

27th Avenue. The residence was bordered by a chain link fence which surrounded the perimeter of the area itself, the residence consisted of three bedrooms and two bathrooms, a Florida room, a back porch area and a kitchen.

Q Did you have occasion to go inside the bedrooms, I mean, inside the premises?

A Yes.

Q What unusual did you observe in the living room area?

A Just prior to entering the living room itself through the front door, I noted that the front screen door, which entered into the living room itself, was cut. The screen had an approximately 17 inch incision, a vertical incision which was located approximately an inch and a half inward from the locking device of the door. It was a hook lock.

I then proceeded into the living room.

Q Let me show you a series of pictures marked as State's Exhibits 1-K, 1-P, 1-N, 1-O, 1-Q, 1-R and 1-T.

I will ask you to go through all of those and tell the court whether you recognize each and every one of them?

A Yes, I do.

Q Do they truly without going into them, do all of them truly and accurately depict what is portrayed there inasmuch as you saw them the night of September 23, 1976?

A Yes, sir.

MR. ADORNO: Judge, I would move them all into evidence.

MR. TUNKEY: Same objection as previously stated to the other photographs.

THE COURT: Overruled.

[Thereupon the photo-

graphs referred to
were marked as State's
Composite Exhibit No.
8 and received in Evi-
dence.]

Q [By Mr. Adorno] Let's start
with State's Exhibit No. 8, Composite No.
A, and I will ask you to please tell the
court where that particular exhibit fits
in the scene?

A State's Exhibit A is a photo-
graph taken of a portion of the living
room. The photograph was taken specifi-
cally in this area or portion of the liv-
ing room.

The wooden object shown in the
picture is the leg of a coffee table
which is located just in front of a daven-
port. The piece of twine located south
of the leg of the chair was knotted at
both ends and several inches in length.

The white shoe shown in the picture was a shoe worn by one of the ladies and there were apparent bloodstains on the shoe itself.

Q Would you hand that up to the court, please, and then describe the significance of State's Exhibit No. 8-B?

A State's Exhibit 8-B is a photograph taken from close up of the head of Katrina Birk, one of the ladies who was in the residence at the time of the incident. She was found on the living room floor resting in a prone position face down, and this photograph depicts the gunshot wound to the right side of her head located approximately four inches above and one inch behind the right ear.

Q Would you pass that one up to the court?

Let me show you State's Exhibit

8-G and ask you to place that in perspective with the scene as you saw it on September 23, 1976.

A State's Exhibit 8-G is a photograph taken from inside the living room towards the front screen door which was the apparent point of entry where the screen was as I described earlier. It shows the condition or portion of the condition of the living room itself, noting the clutter on the floor which was refuse left behind by fire rescue and police personnel who had responded there earlier to treat the live victims in the incident.

Also pictured in this photograph is Katrina Birk lying in the position that I previously described.

Q Would you pass that up to the court and then tell the court the location and significance of State's Exhibit 8-C.

A State's Exhibit 8-C is a photo-

graph taken inside the living room of the Birk residence. It shows the northwest corner of the living room and takes in a portion of the davenport, coffee table, shoe and two chairs, and a few end tables. One of the chairs is resting on its back.

Q Is that the area where Ruth Pitzer said she was seated at the time she was shot?

A That's correct. That's the general area.

Q Hand that one up to the judge, please, and I will show you 8-D and ask you to tell the court its relationship to the scene as you saw it.

Q State's Exhibit D is a photograph taken inside the living room of the Birk residence showing a closeup view of the coffee table which was located in the front of the davenport.

On top of the coffee table is a

white telephone. The cord to the telephone was cut. Also on top of the coffee table are several ceramic ash trays and a towel located on the floor underneath the coffee table.

Q Would you pass that up to the court, please, and I will ask you to do the same thing with State's Exhibit 8-F.

A State's Exhibit 8-F is a photograph taken outside the Birk residence within the yard, the backyard specifically, located outside the southeast corner of the residence. It shows a clothesline and secured to the clothesline is a lavender colored sheet. Upon checking the sheet there is an apparent piece missing from it. The sheet is crudely cut or torn from one of its corners.

Q Did you subsequently find out from the defendant, David Washington, that that sheet was torn by him in order to

make the disguise?

A That's correct.

Q And this has not previously been identified, but let me show you 1-S for Identification and ask you if you can identify it?

A Yes. 1-S is a photograph taken outside of the Birk residence in the yard located on the south side of the residence. It shows a portion of the grass, grassy area, and also in the picture is one of the head bands worn by Mr. Washington during the time of the incident itself. It was lavender in color.

Q Let me show you finally State's Exhibit 8-E and ask you to tell the court what that particular exhibit is and the significance thereof.

A State's Exhibit 1-E is a photograph taken inside the Birk residence. It was taken in the living room and it shows

a yellow colored towel which is partially folded and wrapped, and the picture also shows some black discoloration on the towel itself which were apparent places where the towel was wrapped around the gun when it was used as a muffling device. There was quite a bit of black powder residue on the towel.

Q Would you pass that up to the court, please.

Detective, did there come a time when you received information that the defendant, David Leroy Washington, was a possible subject in the Birk homicide?

A Yes, sir.

Q When did you receive that information?

A On the 2nd of November, 1976.

Q Did there come a time that you met David Leroy Washington?

A Yes, sir.

Q And when, where and what time did that take place?

A I first met David Washington at the Dade County Jail on November 5, 1976, at approximately 10:30 a.m.

Q Do you see that individual in the court room?

A Yes, sir. The gentleman is seated between the attorneys wearing the blue colored shirt and maroon colored slacks.

Q Indicating for the record, the defendant David Leroy Washington.

Were you by yourself at the time you first came in contact with the defendant?

A No, I was not.

Q Who was with you?

A Detective Chuck Major.

Q Did you have occasion to trans-

port the defendant or escort the defendant to Homicide in the Dade County Public Safety Department?

A Yes, sir, I did.

Q Did you have an occasion to have a conversation with him at that time?

A Yes, I did.

Q Prior to any conversation with the defendant, did you advise him of his Constitutional Rights?

MR. TUNKEY: Your honor, this is cumulative and I object.

THE COURT: It has already been stipulated as to the Constitutional Rights. Go ahead, please.

Q [By Mr. Adorno] Did you have occasion to have an oral conversation with the defendant with respect to your investigation of the death of Katrina Birk and the shooting of her three sisters-in-law?

A Yes, I did.

Q When did that conversation take place?

A It took place immediately after advising him of his rights, which would have been around 10:45 a.m.

Q How long did you have an oral conversation with the defendant just focusing in on your particular investigation?

A From 10:45 a.m. until 2:00 p.m., a short time before 2:00 p.m.

Q Did you take notes as he was making the statements?

A Yes, sir.

Q And you incorporated those in your notes?

A Yes, I did.

Q Using your notes, if necessary to refresh your recollection, would you tell the court as best you can what you might have said to him and he might have said to you in respect to the oral state-

ment that he gave concerning the killing of Katrina Birk?

A Mr. Washington indicated that he wanted to talk about the Katrina Birk homicide first. He said that there was quite a misunderstanding in reference to that case as evidenced through newspaper articles that were written about the case a day or two after the incident.

He said some of the accounts that were written in the newspaper were incorrect and he wanted to set the record straight so to speak.

He went on to say that the portions of the newspaper article where they spoke of a person coming into the house and immediately shooting all of the occupants therein was completely inaccurate, and he wished to explain exactly what happened.

He then stated that he knew

Katrina Birk for approximately two years; said that he came to know her through her husband, Omer Birk.

He didn't refer to him as Omer, but Mr. Birk. He didn't know his first name. He stated that he came to know Mr. Birk through dealing with Mr. Birk and another proprietor who owned the used furniture business that the Birks formerly owned, a Mr. Martin.

He stated that is was more or less a pawn shop, that he burglarize residences in the area of his neighborhood and various areas throughout Dade County and that after burglarizing these residences normally the items that he would take would be in the form of televisions or stereos which were easy to sell. He could get quite a bit of money for them.

He said that he had been to the Birk's residence on numerous occasions

and had learned about a year ago that Mr. Birk was hospitalized as a result of some sort of disease or illness.

During the ensuing year or year prior to this incident, he said that he continued to deal in stolen merchandise and would sell it normally at the business which used to be owned by the Birks but was sold to Mr. Martin. Martin's Furniture is located just behind or east of the Birk residence. It is located at Northwest 103rd Street and 27th Avenue.

He stated that on numerous occasions, generally several times a week, he would bring televisions and stereos to Martin's Furniture Store. He would sell the items to Mr. Martin, and on occasion Mr. Martin, who was familiar with the Birks in that they were in the same type of business, would often go to the Birks residence and ask Mr. or Mrs. Birk, which-

ever the case might be, for case with which to pay Mr. Washington for the merchandise if he didn't have enough cash on hand in the store.

He came to know that the Birks kept cash in their residence; that they continued in the sale of used furniture, that they sold the furniture from their garage located at the rear of their residence, and had been to the residence on numerous occasions and had met Mrs. Birk on several of those occasions.

He stated that he had been to Martin's Furniture Store actually within a few days of the incident; that he had been there earlier in the week, that he had sold several televisions, I believe he mentioned two specific television sets that he sold to Martin's Furniture Store, and that was the last time that he was in the vicinity of the Birk residence

prior to September 23, 1976.

He went on to relate that he decided to rob the Birks because he knew that there was money there and during this period, during the interview, one of my questions to him, which was an area of curiosity to me as an investigator, was if he knew the other three people who were in the residence, did he know the other old ladies.

He said that no, he didn't. He wasn't aware that they would even be there that night, that he had never seen any of those women before and had in fact expected only to find Mrs. Birk alone at the residence that evening.

He stated that on September 23, 1976, he left his residence at approximately 7:30 p.m. Prior to leaving his residence he took with him a .22 caliber revolver, a piece of rope which he had

obtained from a trash pile somewhere in the neighborhood, and also a large kitchen knife.

He said he placed the kitchen knife inside the waistband of his trousers, that he placed the rope also inside his trousers, and that he placed the gun inside a dictionary which he brought with him.

He explained that the dictionary was brought for the purpose of concealing the .22 caliber revolver, that he had cut the pages inside the dictionary so as to accommodate the weapon itself, and then actually placed the weapon inside the dictionary, closed the cover and he carried that with him that night.

He said that he took a bus and went to the area of the Birk residence, got off the bus, arriving in the neighborhood of the Birk residence at approxi-

mately 7:45 to 8:00 p.m., somewhere around there.

He said that after he got off the bus at that particular time in September, at that time of the evening, it was just starting to get dark, and that he waited until dark by sitting on the bus bench after getting off the bus in the area of the Birk residence. When it became dark he proceeded to the alleyway which divides the furniture store from the east side of the Birk residence, walked up the alley which was dark, went to the fenced-in area of the Birk residence, and waited outside the Birk residence for quite some time.

He stated that during that period of time that he was waiting outside the Birk residence, he took off his jacket. He said that he was wearing on that evening a green colored Army-styled jacket,

a gold colored tank top shirt, blue jeans, bell-bottoms, and brown Hush Puppy shoes.

He stated that he took off the green colored Army jacket and put the dictionary inside the jacket, wrapped it up and concealed it in some bushes just outside the chain link fence. He then proceeded into the yard of the Birk residence, positioning himself outside the window of the residence.

He stated that from outside the residence he was able to look inside, that there were lights on inside and he observed not only Mrs. Birk, who he expected to be there, but also other old women.

Upon seeing the three other women, he stated that he wasn't quite sure as to whether he was going to carry through with his plan to rob Mrs. Birk. He wasn't counting on them being there and he wasn't

sure whether he could handle them or not.

He said that during this period of time, he went from window to window outside the residence keeping an eye on all of the occupants. He finally decided at one point that he would go ahead with his plan to rob Mrs. Birk but he was going to wait until all of the occupants, that is the other three women and Mrs. Birk, until they all became stationary.

At that particular time I asked him to explain what he meant by "stationary" and he stated that he meant that he was waiting for all of the people, all of the women, to gather in one location at one time, at the same time, and that they finally did in the living room of the residence.

He stated that he looked through the living room window, saw that they were

watching the Ford-Carter debate on television and made a comment to me that he could probably tell me more about the Carter-Ford debate than they could, that he was there that long and had been watching what was going on inside the living room with that much concern.

He stated that he finally went to the rear of the residence where he saw the sheet hanging on the clothesline. He made a decision at that time to disguise his face because he stated that he was afraid that Mrs. Birk--well, he said without any question Mrs. Birk could identify him from all the previous occasions he had been over to the residence. But another reason that he gave for disguising his face was the fact that he didn't want the other three women to be in a position or be able to ever identify him if it ever came up.

He took the sheet, tore a piece of it and formed several headbands which he referred to as bandages.

He stated that he knotted the material, there were strips of material, he knotted them, fitted them around his head so as to disguise a portion of his forehead, nose and chin.

MR. TUNKEY: Judge, I will object as to the narrative response of the witness, and number two, to the fact that this is simply a recounting of that which has already been admitted in evidence, the defendant's statement in written fashion.

THE COURT: I am not aware that it is a recounting. Counsel has not had the opportunity to review the statements. If there is anything that is duplicitous, we will certainly recognize that, sir, and give it no further heed.

Go ahead, please.

A Then he placed the disguise over the portions of the fact that I just mentioned. He proceeded to the front door of the residence where he had previously noticed that the front door, the front inner solid door was open. However, the screen door was closed and latched. He then went to the front door, withdrew his knife from his trousers, and then he cut the screen with the knife and also at the same time lifted the latch with the knife, opening the door, and he went into the living room.

 He then described where the various women were seated within the living room itself. He said that he produced his .22 caliber revolver, that he held the gun on the women and ordered them to all get down on the floor, that it was a robbery, for them to be quiet. If they followed his instructions, he would not hurt them.

At that particular time, Mrs. Birk, who he recognized, said something to the effect that if you want the money, I will take you to the money if you let me up. She got to her feet, went to the kitchen area of the residence with Mr. Washington. She opened up the cupboard and took down a silver colored canister which contained some bills and a large amount of cash. She gave him the money. He placed the canister upon the kitchen table, opened it up momentarily and checked the contents, dumped it out to see how much money there was. He wasn't expecting to find that small amount of cash in the house.

However, he was frightened and he was scared that something might not go right, that he wanted to take what he had and go.

He then escorted Mrs. Birk back

into the living room area of the residence. During this period of time he recalled that Mrs. Birk made frequent references to her son who was expected home at any moment, that he was out for the evening and could come home at any time, and she didn't want him harmed.

She asked Mr. Washington to take the money, to go, and then made further comments such as "You're a nice boy, why don't you take the money and go and don't hurt us."

He stated that he didn't feel at that particular time that he was recognized by Mrs. Birk, however, he characterized that particular comment as playing on his intelligence. He went on to relate that after he escorted Mrs. Birk back into the residence that he took out the rope that he had inside his trousers.

He stated that prior to entering

the residence he had divided the section of rope that he took with him into four pieces; one with which to tie each victim with.

He then tied the victims, tied two women who were waiting on the floor, and then he also tied Katrina Brik, who he had assume the same position as the others on their stomach, flat on the living room floor.

He then went to the living room closet where he obtained several towels and after obtaining the towels, he went to where the women were tied and stuffed the towels into their mouths so as to gag them.

He stated that he was rechecking the knots that he bound each of the victims with and also was rechecking the gags or the towels that he had placed into their mouths, and that apparently Mrs. Birk had managed to get to her feet.

He stated that Mrs. Birk had started for the kitchen area of the residence. At that point he ran to where she was, grabbed her, tried to throw her back onto the floor. There was a brief struggle during which he is trying to subdue her and throw her back on the floor, however, Mrs. Birk was offering some degree of resistance and at that point, he withdrew the knife and took the knife and stabbed her several times on the back and sides of her body.

He stated that after stabbing her numerous times with the knife that she collapsed to the floor and after collapsing to the floor, he took the revolver and wrapped a towel around the barrel so that the gunshots would not be heard by neighbors or not as loud, anyway.

He then walked up to where she was lying on the floor, placed the gun against

her head and fired one shot into the back of her head and fired one shot into the back of her head with the towel wrapped around the barrel.

At that point he described the situation in the living room as that the other women who were on the floor tied up and gagged, that they started to squirm. He characterized them as panicking after seeing what happened to their sister.

He then went to the other two women who were on the floor, put the gun to their heads, fired one shot into each of their heads, and also stabbed them several times.

After doing this, he turned on the woman who remained seated in the chair during this entire incident. He recalled her saying something to him about "Please don't shoot me," or something to that effect,

and at that point he put the gun to her head.

At that point, he also stabbed her. She fell to the floor. He ran into the kitchen, grabbed the money, ran out the back door, grabbed his jacket and dictionary that were placed in the bushes outside, ran through the alley, across the street to the Shell station, located on Northwest 103rd Street and 27th Avenue, flagged a ride with an unknown person who he offered to pay for a ride, stated that the person did in fact give him the ride after he gave him four dollars, that he asked the person to drive him to the vicinity of Northwest 62nd Street, which he did, dropping him off at 62nd Street and 27th Avenue.

At that time Mr. Washington stated he got out of the car, walked back to his residence, disrobed and counted the proceeds.

He stated that the canister held, as he recalled, eight dollars, eight one dollar bills and a large amount of change, which totaled in the area of \$120, mostly in quarters.

The following day he went to J. M. Fields where he made some purchases with the money.

Afterward he went to supply some details about the Meli case which I told him I had nothing to do with and I wasn't there to ask him any questions about that particular case. But he did mention that the gun he shot the women with was the gun that he stole from the Reverend Daniel Pridgen two days earlier. It was the same gun.

He then stated that the knife that he used to stab all the women with was the same knife that he used to stab Frank Meli with a few days later after

this incident.

Q Upon the conclusion of the oral statement, what, if anything, did you do?

A I then secured the services of one of our stenographers to take a formal statement from Mr. Washington as to those facts.

Q And did you take a formal statement?

A Yes, I did.

Q Was that formal statement typed?

A Yes, sir.

Q And did you give the defendant an opportunity to read that formal statement and make any corrections as to truth or what occurred on the night of September 23, 1976?

A Yes, sir.

Q Do you have the rights waiver form with you that was executed?

A Yes, I do.

MR. ADORNO: Based upon the stipulation, Judge, I would like to make that a part of a composite exhibit along with the confession given in this particular case.

THE COURT: Make that a Composite Exhibit as earlier.

[Thereupon, the documents referred to were marked as State's Composite Exhibit No. 9 and received in Evidence.]

Q [By Mr. Adorno] Detective, did you ever inquire yourself, or did he tell you why he committed the Birk, the Pridgen homicide?

A Yes.

Q Would you tell the court what the conversation was of the defendant concerning that specific matter?

A He stated that he did all of these crimes for one reason and that was money.

He stated that he needed money. He wanted money and he went out and got the money. He stated that had he got enough money from the Reverend Daniel Pridgen, which was the first case in chronology, that he wouldn't have gone on and murdered the next one.

He stated that if he had gotten enough money from the second one, which would have been Katrina Birk, that he wouldn't have gone on the murder Frank Meli, and then when he described--when I asked him about the Meli case, he stated that where he went wrong was involving his brother and another person in that case.

If he had acted alone the chances are that the police would have never caught him, that we wouldn't have been there

talking at that particular time, and that he got greedy. He made a point to say that.

He said that in the Meli case he started to get greedy. He wanted more money, and that if we hadn't caught him in that particular incident that he wouldn't have been satisfied, that he would have gone on and tried to obtain some more money.

MR. ADORNO: Your witness.

CROSS EXAMINATION

BY MR. TUNKEY:

Q Did he tell you what he wanted the money for?

A Not specifically, no. We inquired of his background and he told us about his wife and his children, and he did mention that he used some of the money to help his wife and to help his children.

Q Did he tell you that he bought

clothes for his baby at J. M. Fields?

A Yes, he did.

Q Now, on November 5 when you first came into contact with David Washington, did he, at that time, give you any indication, either verbally or through a printed document, that he wished to have an attorney present at that time?

A No. We executed a written document, the right[s] waiver form.

Q That was prior to the written statement, wasn't it?

A That was incorporated into the statement. He was advised all over again of his Constitutional Rights, and we also, when we got to this part of the form about the attorney, I asked Mr. Washington, I told him that he was aware that you were his counsel, and that if he wanted you to be there at that particular time that we would contact you, and he stated that

he did not, and that he would talk to us without you.

MR. TUNKEY: That's all.

MR. ADORNO: Nothing further.

[Witness excused.]

THE COURT: We will break now until quarter to two.

[Thereupon, a recess was taken until 1:45 p.m. of the same day.]

- - -

AFTERNOON SESSION

[The sentencing reconvened at 1:45 p.m., pursuant to the taking of recess.]

Thereupon:

HUBERT LAWRENCE ROSOMOFF
was called as a witness on behalf of the plaintiff and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ADORNO:

Q Would you state your name, please, and occupation?

A Hubert Lawrence Rosomoff. I am physician and particularly a neurosurgeon.

MR. ADORNO: Do we have a stipulation as to the doctor's qualifications?

MR. TUNKEY: Yes.

THE COURT: Thank you.

Q [By Mr. Adorno] Doctor, did you have occasion to examine a Georgia Griffith probably in the early morning hours of September 24, 1976?

A Yes, I did.

Q Sir, where did you conduct that examination?

A I first saw Miss Griffin on the way to the operating room, she having come through the emergency room at Jackson

Memorial Hospital.

Q Sir, would you describe for the Court any injuries that you found on Georgia Griffith?

A Well, at this time she had an obvious gunshot wound to the right side of the head and a stab wound in the right chest and this had already been treated down in the emergency room with a chest tube.

Q Would you show the Court, please, where the entry on the gunshot wound was to her head?

A Just right here in the middle of the head.

Q Within the right side of the head.

A Right side of the head.

Q Were you able to find an exit wound?

A There was no exit wound, although

the X-rays of the head showed the bullet had gone straight through the brain and had lodged underneath the bone on the opposite side.

Q Would you indicate to the Court where the projectile lodged?

A Here, straight through and through.

Q Entry and lodging almost being parallel?

A Yes.

Q Could you describe for the Court the stab wound that you observed?

Q Well, the stab wound was in the right chest. I didn't see it in its entirety because it had already been covered with a bandage and the chest tube was coming out and at this time we were very much more concerned with saving her life from the missile wound in her head and I can't give you all those details.

Q Did you perform any surgery on Georgia Griffith at that time?

A Yes, I did.

Q Would you tell the Court what that was?

A Yes. There was actually two operations to the head because it requires first an operation on the right side, which is the entry area of the missile, and a second procedure on the opposite side in order to deal with what is usually a blood clot on the far side rather than the near side, and also access to the missile itself in an attempt to clean the track of the wound which goes all the way through the brain in this particular case.

Q Was your operation successful?

A As far as the technical aspects, yes.

Q What was the last time that you saw Georgia Griffith before she returned

to Indiana?

A At the time of her discharge from the hospital on 10/30/76.

Q Sir, will you describe her condition to the Court at that time?

A At this time this lady was still unconscious. There was a reflex capability of moving all four extremities, but she was not in contact with reality or in any way able to deal with commands that were given to her, and I would describe her as comatose and what we would call vegetative.

Q Would you please tell the Court what you believe the prognosis at this time is as to Mrs. Georgia Griffith being able to ever recover from the injuries suffered that evening.

A I would say that based on past experience and in particular in this age group that the chances of her improving beyond this particular state are really

remote.

MR. ADORNO: Thank you, Doctor.

MR. TUNKEY: No questions.

[Witness excused]

MR. ADORNO: Based on prior stipulation, I will call Dr. Wright who is the medical examiner and I will provide a copy of the protocol to assist the Court.

Thereupon:

RONALD KEITH WRIGHT

was called as a witness on behalf of the plaintiff and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ADORNO:

Q Would you state your name, please, and position?

A Dr. Ronald Keith Wright. I am deputy chief medical examiner of Dade County, Florida.

MR. ADORNO: Are the doctor's

qualifications stipulated to?

MR. TUNKEY: As a forensic, pathologist, yes.

Q [By Mr. Adorno] Doctor, in your official duties as deputy chief medical examiner, did you have occasion to conduct an autopsy of Katrina Birk on September 24, 1976?

A Yes, I did.

Q And where was that autopsy performed?

A At the medical examiner's office in Dade County.

Q Would you tell the Court what findings you made after conducting the autopsy of Katrina Birk?

A Basically, we found a gunshot wound to the back of the head and nine stab wounds, five of which were deep wounds, four of which were superficial.

Q Doctor, did you take any photographs at the medical examiner's office that would assist you in showing the Court where these various wounds were located in the body of Katrina Birk?

A Yes, I did.

Q Would you please pull them out for me?

A Certainly.

THE COURT: Please show them to Counsel.

Any objection to them, Counsel?

MR. TUNKEY: Yes, Your Honor. They are duplicitous and only serve as an attempt by the State, in my estimation, to inflame the Court in its decision. They are irrelevant, and immaterial.

THE COURT: Overruled.

We will receive them as evidence in the case.

[Thereupon, the photographs

referred to were marked State's Exhibit No. 10, composite, and received in evidence.]

Q [By Mr. Adorno] Doctor, let me show you State's Exhibit No. 10, A through E, being numbered on the back. Would you, by referring to the specific letter, would you describe to the Court the wounds that you found on Katrina Birk when you performed the autopsy?

A Yes. State's Exhibit 10-E is a photograph which shows the head of Katrina Birk and shows the entrance wound which is located four inches above and one inch behind the right ear. This wound, incidentally, did not penetrate the brain due to the fact that she had a condition known as hyperostosis frontalis interna which means a thick and is occasional finding of elderly females. The photograph which is State's Exhibit D, or

State's Exhibit 10-D, shows it barely, shows the wound here on the front of the abdomen, and it is shown somewhat better in State's Exhibit 10-A, which shows the stab wound located in the abdomen just above the umbilicus and also shows a stab wound on the right side. Both of these stab wounds entered the liver, however, were no related with the one stab wound which was the priamry cause of death. The others would have been fatal in time. Photograph number State's Exhibit 10-B demonstrates the two major stab wounds of the back, the first, in the upper left back, penetrated into the left lung, into the aorta. This was a small tear in the aorta from which Mrs. Birk eventually bled to death. The other stab wound here, lower in the left side of the back, is a wound which, although it entered the peritoneal cavity, the cavity of the abdomen, from

the back, struck no major organs.

Photograph, State's Exhibit 10-C, shows two of the five major stab wounds which are located in the left flank of the body, both of these wounds are quite deep, entering the liver; and it also shows the four minor stab wounds which did not penetrate any distance appreciably.

Q Doctor, how many stab wounds did you find on the body of Katrina Birk?

A Nine.

Q How many of those stab wounds would have been fatal?

A Four of the stab wounds would have been expected to be fatal in time. One of the stab wounds was relatively, is more rapidly fatal. The ones to the liver are quite potentially fatal.

Q Doctor, how much force would be necessary to inflict the five major stab wounds that you found on the body?

A It depends on the sharpness; the sharpness of the knife.

Q Were you able to tell at all from the photographs observing the pictures, and seeing the body itself?

A I cannot determine. It depends upon the sharpness of the point primarily of the knife. It requires at least fifteen pounds of pressure under ordinary circumstances to drive the knife in. There is some evidence, particularly to the wound which is in the upper left back, that the knife was driven to its full depth; that is, there is a small abrasion upon the skin. So it would seem that it was driven all the way in. However, lacking any idea of the sharpness of the point I could not say, except this minimum figure which is about fifteen pounds.

Q Doctor, what was the cause of death?

A Mrs. Birk died as a result of multiple stab wounds of which the most severe was the one in the left back.

MR. ADORNO: Thank you, Doctor.

THE COURT: Cross, Counsel.

MR. TUNKEY: None.

[Witness excused]

Thereupon:

JOHN SPIEGEL

was called as a witness on behalf of the plaintiff and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ADORNO:

Q Detective, would you please state your name?

A John Spiegel.

Q And your occupation?

A Police officer with the Dade County Public Safety Department.

Q Assigned to any specific unit?

A Homicide section.

Q How long have you been with the homicide section?

A Two and a half years.

Q How long have you been a police officer with the Public Safety Department?

A Four and a half years.

Q Did there come a time when you became involved in the investigation of the death of Frank Vincent Meli?

A Yes.

Q What were your duties with respect to that investigation?

A I was the lead investigator into that case.

Q When did you first become involved in that particular investigation.

A Approximately four a.m., Wednesday, September 29th.

Q Sir, what was the first thing you did with respect to the investigation

on that date and at that time?

A I responded to the residence of Angelo Meli, a brother of Frank Meli, and conducted a brief investigation at that time in to the alleged ransom demand.

Q Sir, what was that ransom demand?

A The demand was that Angelo Meli was to take \$2700, the cancelled bank book, and place the same into a brown paper bag, take a taxicab to the area of Northwest 79th Street and 27th Avenue where there is a Royal Castle, take the bag with the money and the bankbook and put it behind the Dempsey Dumpster, and he was instructed first to go approximately an hour later to the area of the Biscayne Dog Track, and after approximately an hour's time he would find his brother there. A short time after he received a second phone call from the same black male who was later identified as David

Washington to the effect that instead of going to the Biscayne Dog Track, go ahead and go over to the main Sears Store across the street from the Royal Castle and walk around in there and about a half-hour later he would find his brother. He was assured that no harm would come to his brother; that once the ransom demand was met that his brother would be released unharmed. He was admonished not to call the police and to trust David Washington, and on that basis his brother would be released unharmed.

Q Were you able to determine when Frank Vincent Meli first met or contacted David Leroy Washington?

A Yes. The investigation indicated that Monday, September 27th, is when David Washington first began calling the victim in regard to the victim's 1974 Camaro

which he had placed an ad in the newspaper trying to sell it, and on Monday Washington called three or four times, ver interested in the car, telling the victim that was just the kind he wanted; that it had bucket seats and so forth and so on. He also told the victim that he was employed at the Sears Auto Tire Center at Northside, and that he had no car. Therefore, he couldn't come to where he was to look at it and that he would like for the victim to bring this car to him approximately noontime on Tuesday when he allegedly had a lunch breat. Then he would look at the car and if everything was okay he would pay him the full \$3600 for it; that if somebody in the meantime had wanted to buy

the car and wanted to give him a down payment, that Washington would give him the full \$3600, that he wanted the car very much. On that basis an arrangement was made on Monday for Frank Meli to meet the victim or to meet Washington at the tire center around noon.

Q Did that meeting take place on Tuesday?

A Yes, it did. On Tuesday the investigation indicated that the victim and his car were seen at the Sears Tire Center approximately noontime or shortly thereafter, and the victim was also observed driving away from his appointment in this car by his roommate who was aware of the telephone calls from, at that time, the unidentified black male, about the car.

Q Did there come a time when you discovered or found the 1974 Camaro

belonging to Frank Vincent Meli?

A Yes. Thursday, approximately 7:20 p.m., the car was located at Tally Embry Ford, 90th Street and Northwest 7th Avenue.

Q Were you able to determine when that car first got to that particular location, Tally Embry Ford?

A Yes. Contacting the personnel there indicated that a black male, who was later identified as David Washington, who was posing at that time to be Frank Meli came to the car dealership in the early afternoon on Tuesday, the 28th, and he wanted to sell the car, and they negotiated for a while and gave the black male posing as Frank Meli a check for \$2600. That was on Tuesday afternoon.

Q Do you know whether the defendant made any attempt to cash that check on Tuesday afternoon?

A Yes.

Q Where was that attempt made and was it successful?

A Later in the afternoon on Tuesday, the 28th, Washington took a taxicab from Tally Embry Ford to go to the bank and made one stop where he had the taxicab driver park the car on Northwest 65th Street and 29th Avenue. Washington exited the cab for a few minutes, came back and from there they went to the bank. Washington made one attempt on Tuesday, shortly before three p.m., to cash the check and the teller refused to cash it. Washington then telephoned Tally Embry Ford complaining that he was unable to cash the check and was told by the Tally Embry Ford that all would be taken care of in the morning; that they would make sure the check would be cashed.

Q We are speaking of Wednesday

morning that an attempt to cash the check was made again by the defendant?

A Wednesday morning he successfully cashed the check at the Southeast First National Bank Downtown.

Q During that period of time while the defendant was trying to cash the \$2600 check, what arrangements, if any, were you making toward getting the ransom demand met?

A One of the requirements of Washington of Angelo Meli during one of the two ransom demands on the phone was that he was to, Angelo, was to get the money from the Fort Lauderdale bank account. He found out that the victim had a joint account with another family member at a bank in Fort Lauderdale which had approximately \$2700 in it. I went with another family member, other than Angelo, to another family member's

looked inside and looked all around and then walked a few more feet north and stood around the area on the east side of the Royal Castle. This was a few minutes before Angelo Meli made the drop.

Approximately five minutes or three minutes to three o'clock Angelo Meli arrived in a taxicab, exited the taxicab and put the bag where he was supposed to. Angelo hesitated for a few moments and Washington was watching him very carefully. I took two photographs of Washington at that location. Angelo then walked off per his instructions to the Sears store and Washington stood around for a few minutes and then he walked to the Burger King where I lost sight of him. At that time he was wearing red, white and blue sneakers, Washington was, and a few minutes later it appeared to me to be the same negro male was back

in the area of the Royal Castle, but he had different clothes on and a different hat. We watched this gentleman for the time that he was there, and he was there only a few more minutes and then he left on a bus and went north.

We stayed at the drop point and surveilled it for a total of four hours. The money was not picked up and at the conclusion of that time Angelo Meli went back, picked up the bag and got into another taxi and went home.

Q At the time that you first saw David Leroy Washington, did you know what his involvement was in this particular case?

A No, I didn't.

Q Were you photographing any other individuals who were suspicious in the area of the Royal Castle?

A Yes, we were.

Q What did the members of the homicide unit do Wednesday night?

A We began to search for the car.

Q How about Thursday?

A On Thursday, we had not only members of the homicide section but we had all detectives from each district begin to look for the car and finally at 7:20 p.m. we found it.

Q And after finding the car at 7:20 p.m. on Thursday night, in which direction did your investigation focus?

A It focused on an effort to locate the taxicab driver who the employees recalled that Washington, or whoever he was at that point, took a cab from Tally Embury to the points unknown to them. We succeeded in locating the taxi-cab driver who picked up Washington at 2:16 p.m. on Tuesday and from locating that individual we were able to pinpoint the area where Washington made a stop en route to the

bank around 65th Street and 29th Avenue. On the basis of that, a re-search was conducted in several of the residences based on owner information as per tax rolls, and at that point our investigation focused on the residence immediately across the street from the Taylor residence which later turned out to be the scene.

On the basis of that, when personnel from homicide section entered the Taylor residence about 7:10 a.m., on Friday, October 1st, a money wrapper was located inside the house.

Q Whose house are we talking about?

A The Taylor residence, 6520 Northwest 29th Avenue,

Q Did you later learn David Leroy Washington also lived at that house?

A Yes.

Q What relationship, if any, is

Nathaniel Taylor or Robert Taylor to the defendant?

A They are stepbrothers.

Q You may continue; what happened then?

A The money wrapper initially was inconclusive as far as being able to positively determine that it was part of the proceeds of the sale of the car or the cashing of the check. However, based on the fact that it was found in the house, Nathaniel Taylor was interviewed and from him we obtained--he gave voluntarily a consent to search the residence thoroughly. On the basis of that consent to search, a search of the residence and the yard around was done. At approximately 2:30 p.m. David Washington approached two detectives that were on the scene at that time and advised them that he was the one that killed Frank Meli, and on the basis

of that Washington subsequently gave a formal statement to that effect.

Q At the time that the defendant, David Leroy Washington, surrendered to or came up to two homicide detectives, was Nathaniel Taylor in custody in the homicide office?

A He was at the office.

Q I will show you State's Exhibit 1-W for identification and ask you if you recognize that?

A Yes, I do.

Q Does it truly and accurately depict what is portrayed therein as was first observed on October 1st, Friday, 1976?

A Yes, it does.

MR. ADORNO: The State would move 1-W in evidence, Your Honor.

MR. TUNKEY: No objection.

THE COURT: Mark it received.

[Thereupon, the photograph referred to was marked State's Exhibit No. 11 and received in evidence.]

Q [By Mr. Adorno] Would you tell the Court what State's Exhibit No. 11 is and please show it to the Court?

A Your Honor, this depicts the interior of the living room of the Taylor residence at 6520 Northwest 29th Avenue. Parked inside was a Honda Motorcycle. There is a mattress on the floor and this counter top is adjacent to it. This is the front door here, and this faces east onto 29th Avenue.

MR. ADORNO: I have no further questions, Your Honor.

THE COURT: Cross, Mr. Tunkey.

CROSS EXAMINATION

BY MR. TUNKEY:

Q Detective, you took a statement

from David Washington with reference to this case, am I right?

A I was present, yes, sir, when the formal statement was given.

Q And you were the lead investigator on this investigation?

A Yes, sir.

Q The Meli case.

A Right.

Q Did you believe that David Washington killed Frank Meli?

A Yes, with help.

Q Do you believe that he was--I understand your answer. Do you believe he was personally responsible for the death of Mr. Meli?

A Yes, I do.

Q Have you ever testified otherwise?

A I believe I have testified that in my opinion Nathaniel Taylor also

participated in the stabbing of Frank Meli.

Q So you are simply saying that you do not believe he acted alone?

A Right.

MR. TUNKEY: That's all of this witness.

THE COURT: Anything else on redirect?

MR. ADORNO: No. Thank you.

[Witness excused]

Thereupon:

CHARLES ZATREPALEK

was called as a witness on behalf of the plaintiff and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ADORNO:

Q Detective, please state your name and official position.

A Charles Zatrepalek. I am employed at the Dade County Public Safety

Department. I work within the homicide section.

Q How long have you have been with the homicide section?

A Approximately fourteen months.

Q And how long have you been a police officer with the Public Safety Department?

A Six and a half years.

Q Did you have occasion in your official duties to become involved in the investigation into the death of Frank Vincent Meli?

A Yes, I did.

Q And based on your involvement and participation in that investigation, did you have occasion to come into contact with David Leroy Washington?

A Yes, I did.

Q Do you see that individual in the

courtroom?

A Yes, I do.

Q Would you point him out?

A It's the gentleman sitting at the defense table in the blue shirt.

Q Indicating, for the record, the defendant Washington.

When did you first see the defendant?

A It was on the morning of October 1st, approximately seven a.m. in the morning.

Q And where?

A At his residence which would be 6520 Northwest 29th Avenue.

Q Did you have any conversation with him at that time?

A No, I didn't.

Q Did you have occasion to be back in that vicinity later on that day?

A Yes, approximately 2:40 in the afternoon I was in that vicinity.

Q Were you by yourself.

A No, sir. I was with Detective Wolf.

Q What was the purpose for your being there at that time?

A Detective Spiegel had asked me and Detective Wolf to proceed to the 6520 Northwest 29th Avenue address in order to locate a man by the name of Nathaniel Taylor. When we arrived there, we knocked on the door and there was no response. We contacted Detective Spiegel at which time he told us that Nathaniel Taylor was in the homicide office.

Q At that time did you receive information from Detective Speigel that he had obtained a consent to search the premises, 6520 Northwest 29th Avenue?

A Yes, we did.

Q Did you begin conducting a search of that particular area?

A Yes. We returned to the residence and just prior to us starting the search, Mr. Washington came walking down the street with his hands on his head, his pockets turned inside out, at which time he yelled to us and yelled "I'm David Washington. You guys are looking for me."

Q Did he say anything else as he approached?

A He was within about five feet of us and said, "I'm David Washington. You got my baby brother, his girl and their baby downtown. I'm the man that you're looking for. I'm the man that killed the white boy."

Q And did he make any motions at that time while he was making that statement.

A Yes. He pointed over to a tree and said that after he killed the white boy that he had buried him underneath the tree and he pointed toward his house.

Q Prior to him making that statement, had your investigations led you to believe that there was in fact someone buried in that location?

A Yes. Detective Wolf had found what he thought was a grave at that time.

Q What, if anything, did you do with the defendant at that time when he made those statements?

A He was somewhat excited so we took him off the middle of the street to the sidewalk area. I told him who I was. I said: "I'm Charles Zatrepaek, a police officer with the Dade County homicide." He was somewhat excited and I said: "Calm yourself down, David." Detective Wolf at that time went and got hold of a radio and

contacted Detective Sergeant Felton and asked him to come to the scene.

Just prior, before Sgt. Felton got there, I said, "David, before you say anything, let me explain your rights to you," at which time I began reading him his rights.

Q Sir, did there come a time when you transported him down to the homicide office?

A Yes, we did. Sergeant Felton and myself did.

Q Did there come a time, once you arrived at the homicide office, that you had an occasion to have a conversation with the defendant?

A Yes, we did.

Q Approximately what time did that conversation begin?

A It was approximately 3:10 to 3:15 in the afternoon when again I

explained to him his constitutional rights. At this time I showed him the rights warning sheet that we use at the office there.

Q Do you have that rights warning form with you?

A It's part of this case file, yes, sir.

Q Can you find it without too much difficulty?

MR. TONKEY: JUDGE, I stipulate he read him his rights.

MR. ADORNO: I accept that.

THE COURT: Let him find a copy of it, please, and make it a copy with the statement that had earlier been alluded to at the time of the original plea.

Q [By Mr. Adorno] At the conclusion of your testimony if you can find this please bring it back to me and I

will place it in the court file since there is a stipulation.

Who was present during the taking of the oral statement from the defendant?

A Sgt. Felton, myself and David Washington.

Q Approximately how long did the oral statement take?

A Approximately two and a half hours; in that time period.

Q Sir, using any notes that you might have taken, if necessary to refresh your recollection, would you please tell the Court what you or Sgt. Felton might have said to the defendant or the defendant might have said to you during the taking of the oral statement at the homicide office on October 1, 1976?

A Well, again we explained--I was about to explain his constitutional

rights---

Q After explaining his constitutional rights, get into the substance of the conversation concerning Frank Vincent Meli's murder.

A We started out by saying--I told you him, I said: "David, let's start from the very beginning." I said: "Let me ask you the questions. You go ahead and answer them the best you can." I asked him if he knew a Frank Meli. Yes, he did.

How did you meet this man? He said he met him through the newspaper article. He was looking in the want ads of the classified section. He was looking for a car to buy. He said he had formulated a plan in his mind that he would call somebody up, tell them that he wanted to buy the car. At that time he would proceed to where he would meet him at and he had formulated the idea that he would

kidnap, take the legal papers from the car, hold the person until he could sell the car and get the money.

MR. TUNKEY: Judge, may I voir dire?

THE COURT: As relates to what?

MR. TUNKEY: As to whether or not that which he is now beginning to testify to is contained within the written statement and if so I would say that there is no need to go through or go forward with this man's testimony other than for any additional things not covered in the written statement.

THE COURT: Are there things, any of your testimony that might not be reflected in the written statement?

THE WITNESS: There are two or three items in there, Your Honor, that I failed to ask in the formal statement.

THE COURT: I think for the purpose of continuity, Counsel, I will do the

same as the other two statements. Go ahead.

q [By Mr. Adorno] You may continue your answer.

A He wanted to state he found it in a newspaper in the Miami Herald that an individual had, he says, a '73 Camaro for sale. He was asking a price of \$3600. He called. He found out it was a man by the name of Frank Meli and during the conversation with him on three different occasions on Monday, which would be the 27th of September, he had talked Mr. Meli into meeting him Tuesday at approximately one p.m. He had three conversations with him on Monday. At one point he seemed that he was very concerned, that he was going to buy the car and if anybody else was going to buy the car he would give a deposit in order for Frank Meli to hold

the car. Tuesday he called again, the same number, and said he didn't talk to Frank Meli but to somebody else who he thought was his brother. He was confirming the meeting that was to take place at 27th Avenue and 79th Street at Sears and Roebuck auto supply dealer, which was supposed to take place at one o'clock.

The party that he was talking to on the phone said that Frank Meli would be en route there and he had nothing to worry about. Approximately 12:30, one o'clock, he said an individual did arrive in a Camaro. He introduced himself as Dave and the individual in the car introduced himself as Frank. He then began to look at the car, asked if he could test-drive the car. He took the car, started to drive around the area. He said he was satisfied with the car and started heading in the direction of his home which was

6520 N.W. 29th Avenue. After he acknowledged to him that he was going to buy the car, he said he would have to go to his house to get the money. He arrived at the house, parked in front, and he asked Meli to come inside. Meli said no. He came back with the statement that this was a bad neighborhood. "I'm not going to bring that much money out because somebody is liable to knock you in the head and take it away," and he convinced Meli to come into the house with him. As they got inside the house, he had placed a knife underneath a towel at the doorway there prior to him leaving the house that day.

He had Mr. Meli in front of him and Mr. Meli got inside the house. He produced the knife, grabbed Mr. Meli by the back of the collar, placed the knife

to his side and placed him in a chair that was in the center of the room there. He said Mr. Meli at this point said "Just take my car, just take my car." He took him to the back bedroom which was in the southwest quadrant of the house where he tied him up. Prior to getting back there, he said that his brother, Nathaniel Taylor, and another individual known to him as Johnny Mills was in the living room and they were waiting there for him. Prior to tying him up they removed sixty-five dollars from his pants pockets. He twenty-five himself, Mr. Washington, and he gave twenty to his brother and twenty to this other individual by the name of Mills.

He got into the back bedroom where Meli was tied up on the bed in a spreadeagle fashion. He then began to ask him where the papers were for the car.

Mr. Meli told him they were located in a shoebox within the car.

He went back outside and found the shoebox. He did find the papers, which were a title and a registration. Mr. Meli's personal identification--he went through the wallet, took the personal identification that didn't contain any pictures on it which were a voter's registration card and he said two or three other pieces of identification, where he took out the word "caucasian" and "white" and put in, inserted the word "black" or "B".

He told Mr. Mills and Mr. Taylor to stay at the house to watch Mr. Meli. He then left in the red Camaro and began to go to different car lots. I remember one lot was Luby Chevrolet where he had a little bit of difficulty showing the car off. He felt that something was

going wrong. He left there before the man came back outside after they were trying to make a deal. He got to the first car lot, didn't know how to open the hood, and the owner of that car lot became suspicious. He left and he started going through the car to get familiar with it and then returned to several different car lots where they began asking questions about his identification. Finally he arrived at Tally Embry Ford. He met a man there by the name of Rick. He said there was about five or ten minutes of negotiations and this Rick he would buy the car for \$2600, which Mr. Washington agreed to.

He wrote a check out to him in the name of Deloris LoProto who was Mr. Meli's mother. After he showed the identification there, he said he had very little trouble at Tally Embry Ford. He

told him he could cash the check down the street or the bank downtown which was the Southeast First National Bank. They suggested going to the bank downtown for easier purposes of cashing a check. So he took a taxi home, got back to the house. He told the other two individuals who were at the house guarding Mr. Meli that he had got the check, that it was in the name of Deloris LoProto. He approached Frank Meli and told Mr. Meli about the check and Mr. Meli said he would sign or endorse the check being that he has endorsed his mother's name before. The three of them were inside the room. There was a gun present, a knife present. He is not sure who had the gun or who had the knife. But he freed his right hand, he signed and endorsed the check, and Mr. Washington left the house, went to the bank and arrived

there ten minutes to three, approximately and produced the check and identification at the checking account cashier and she refused to cash it for him. He stated he left the bank and called Tally Embry Ford.

When he called there, he told them he was having trouble cashing the check and that if he had any more trouble he would like his car back or he would like the money. Tally Embry Ford told him that there would be no problem with him cashing the check, that he would have to return to Tally Embry Ford the next morning in order for him to cash the check, which he agreed to.

Instead, he came home. That was tuesday evening. The three of them were at the house together. He asked Mr. Meli if he wanted something to eat which he replied that he would like a

chicken sandwich or a sausage sandwich or soda. He sent Mr. Mills and Mr. Taylor out to the store. Prior to them leaving the house, Mr. Meli asked if he could be released from the position he was in which was a spread-eagle position on the bed, and be made more comfortable, but Mr. Washington complied to this by tying his hands in front of him. He stated that Mills and Taylor returned with the sandwiches. Mr. Meli didn't eat much. He drank quite a bit of water and soda and they continued to talk the rest of the evening while they were listening to the fight that was on the radio at that time.

He indicated to Mr. Meli that if anything would go wrong, he would have to kill him. Mr. Meli became visibly upset and he said, then he says that Mr. Meli stated that if he contacted his

brother it would insure him of getting of getting the money. So at approximately twelve or one o'clock he himself walked up to the phone with Mr. Meli as Mr. Meli had his hands tied in front of him and he had a knife with him and that was placed in Mr. Meli's back. He called Mr. Meli's brother and told him that they weren't hurting him, that they were treating him good and he had something to say to him.

Mr. Meli got on the phone and began to talk to his brother and he said, "Do what these guys want you to do. They mean business." He again got on the phone, told Mr. Meli's brother that he wanted \$2700 deposited at the Royal Castle at 27th Avenue and Northwest 79th Street the following day at three p.m. He was to take a cab to this location, put the money in a brown bag. He was to go by the Dempsey Dumpster and place the money on the ground,

walk away, and go to the parking lot and wait thirty minutes where his brother would be released to him.

They again returned home when they got done with this conversation on the phone and he said Mr. Meli was tied up again in a spreadeagle fashion. He said this time he didn't need the help of Mr. Taylor or Mr. Mills. He said he tied his feet first and then untied his hands and tied one hand at a time in each position, again in a spreadeagle fashion. He said Mr. Meli slept very little. He locked the door and he slept on the floor. He said his brother and Mr. Mills were sleeping in the other bedroom with their girl friend and the baby and he slept very little himself that night.

The next morning he went to Tally Embry Ford and he met the used car

manager there. He explained the difficulty he was having with the check cashing at which time he told him that his mother, Deloris LoProto, was a cripple and was in a wheelchair and it would be impractical for her to appear at a bank. He convinced these people that he was in fact Frank Meli and that Deloris LoProto was his mother.

They called the bank and made arrangements with a man, Bill Willis, at the bank to cash a check from Tally Embry Ford. He returned to the bank and contacted Mr. Willis, at the bank, and Willis again questioned the identification and he says that this time that he felt he was on the fourth floor of the bank he had to go all the way through with it, and he then began plotting, conning Mr. Willis to believe that he was Mr. Meli. He showed him identification, had a small

argument with him, and finally Mr. Willis did give him the \$2600.

The money was wrapped, the \$2,000 and the \$500 and \$100 was single. He took a cab back to the house and got back there and Mr. Washington and Mr. Mills were there, along with Mr. Taylor. They divided the money. Mr. Mills received \$200 of the money along with Mr. Taylor. He said he had sneaked back and gave Mr. Taylor another thirty because he was his brother. They were both very happy and excited about the money, and they both left and went back into the room and again started talking with Mr. Meli.

He told him that he had cashed the check but that he was going to go through with the other pickup of the money. He said he left the room, stayed

outside for approximately thirty-five minutes to an hour, came back into the room. As he entered the room, he had a knife with him as he always had when he went to that room. He said Mr. Meli's right hand had broken free from the extension cord he had him tied with. They began wrestling and Mr. Meli is a very big man and as he began to choke him or something he thought Mr. Meli could break loose so he began to stab him. He said he stabbed him four times in the right-hand side of the chest. He said after stabbing him he began to yell, and began to moan quite loudly.

He said he placed a pillow over his head so he wouldn't be heard and [Meli] started to recite the Lord's Prayer and recited that three or four times until finally he did stop. At this point he said Mr. Washington was outside or was

present in the house, and he requested Mr. Washington to go outside and see if he could hear the screams.

Q Excuse me. You mean Mr. Washington or Mr. Taylor?

A I'm sorry, Mr. Taylor. Mr. Taylor did go outside, he said, came back inside and said he didn't hear any further screaming. Mr. Taylor then left. Mr. Washington then secured Mr. Meli again, put him in a spreadeagle fashion, put a gag to his mouth, leaving him there in the room. He said he closed and locked the door, went outside, stayed outside for a short time, went to 27th Avenue and 79th Street where he was going to try to pick up the other money from his brother that was supposed to be deposited there. During this line of questioning I asked him if he was concerned with whether he had been identified at the bank when he

cashed the check or at Tally Embury Ford when he sold the car.

He said he wore a wig and a hat at the time and he felt wouldn't be able to be identified. He said when he finally got to 27th Avenue and 79th Street, he got there approximately an hour before the drop-off was supposed to be made, which was two o'clock, and he observed a cab at three o'clock arrive at the Royal Castle, saw a white male get out of the cab, go to the Dempsey Dumpster, place a brown bag there and begin to walk away and return to the brown bag. He said this got him upset because he thought he was possibly being set up. He saw the cab driver leave, make a phone call, and he felt this was possibly a policeman.

He then began to watch the area and saw two or three individuals that he

thought there was something wrong with. He wasn't quite sure. He went to the Burger King, which is a short distance from the 79th Street area.

While he was at the Burger King, he walked by a car and there were two policemen in the car that had a gun between them, and he was confident that the police were there and before he went to the Royal Castle, he said, he had put another set of clothing on so in the event he did take the money and begin to run he would be able to stop some place, change clothing and hope that he would elude the police if they were chasing him.

He finally made a determination that he wasn't going to take the chance of picking the money up at the Royal Castle. He said he went to the Opa-Locka area to visit a friend whom he wouldn't disclose at this time. He stayed in the

Opa-Locka area until 9:30, ten o'clock, at night, took a bus back to his home, arrived home, went inside the bedroom and saw that Frank Meli was deceased.

He began to wonder how he was going to dispose of the body. He felt if he tried to put the body in the car he was probably going to get caught. So he figured the alternative would be to bury the body in the backyard. He went outside to dig a hole. He saw a gentleman across the street by the name of Mr. Troupe observing him, walked across to the street, talked to Mr. Troupe, told Mr. Troupe that he was digging a drainage ditch that his stepfather had wanted to put there, sewer ditch, convinced Mr. Troupe there was nothing wrong, returned back to the house, finished digging the hole approximately four and a half feet deep, and went into the bedroom, cut the cord that was

securing Mr. Meli. Mr. Meli, he said, was on a blue blanket or bedspread. He dragged him outside by the feet and he said he had difficulty dragging him outside because rigor mortis had set in already. He got to the hole, placed Mr. Meli into the hole. He couldn't remember just if he was face up or face down but he does remember his head toward the north direction, that he had placed a towel around his neck and that there should be cords around his hands. As he was burying him, his brother, Nathaniel Taylor, came back to the house and he said Mr. Taylor asked him what he was doing. He told him that Frank Meli had died, at which time Mr. Taylor began helping bury Mr. Meli.

He said there were two knives involved, one was a butcher knife, six inch blade and eleven inches over-all.

This is the knife he used to stab him with. He took this knife and broke it in little pieces threw it out throughout the neighborhood. The other knife, Mr. Taylor had. He didn't what happened to it. He went inside the house, began to clean up the room where the blood was, and there was a mattress, he said, different articles in there, took this mattress to an area which is near his house and disposed of it. He described this as saying go down to the end of the block, and---

Q Were those, the mattress, subsequently discovered by police officers near that area?

A Yes, sir.

Q You may continue.

A He went back to the room, cleaned up the room, used Clorox and bleach and what not to make sure there was nothing

there, and then he retired for the evening.

He got up the next day and he went out, at which time he bought the motorcycle for eleven hundred dollars. I asked him what he did with the rest of the money and he said he went to the Castaways, did quite a bit of drinking over there, went to the dog track. He spent quite a bit of money at the dog track; and had given \$200 to Mills and \$230 to Taylor, had given some money to his wife and said he didn't have any money left over whatsoever.

At one point, I asked him or said if everything went right in this entire deal, what would he have done to Frank Meli, and he indicated he would have to kill him. He said he didn't originally start that he was going to kill him. He felt confident he would have to

kill him. He said he didn't originally start that he was going to kill him. He said he didn't originally start that he was going to kill him, but he felt confident, and I believe used the phrase, "ninety-nine to one I would kill him."

Q After the conclusion of the verbal statement, did you have an occasion to take a written statement?

A Yes, sir.

Q Was that written statement transcribed?

A Yes, it was.

Q Did you give the defendant the opportunity to read that statement and make any corrections as to the truth or as to what occurred between September 27 and October 1, 1976?

A yes, we did.

Q On that day during your conversation to your knowledge, did the

defendant at that time admit his guilt in any other homicides except the one concerning Frank Vincent Meli?

A No, sir.

MR. ADORNO: Nothing further.

THE COURT: What is the number of that statement, please, that is being admitted?

THE CLERK: Twelve, Your Honor.

MR. TUNKEY: No questions.

MR. ADORNO: Would you ask Harry Coleman to step in, please?

[Witness excused]

MR. TUNKEY: Your Honor, may I inquire as to the purpose of Harry Coleman's testimony? I know him as a chemist from the crime laboratory.

MR. ADORNO: This is a different one. This is, Harry Bill Coleman. He is not with that office at all.

Thereupon:

HARRY BILL COLEMAN

was called as a witness on behalf of the plaintiff and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ADORNO:

Q Would you state your name, please?

A Harry Coleman.

Q Where are you presently living?

A Presently I am on the road traveling.

Q Did you reside here in Miami, Dade County, Florida, back on September 30, 1976?

A Yes, I did.

Q On that date, which was Thursday, did you have occasion to come in contact with David Leroy Washington?

A Yes, I did.

Q Do you see him in the courtroom?

A Yes, I do.

Q Point him out for me, please.

A The gentleman right there.

Q Indicating, for the record, the defendant, David Leroy Washington.

What were the circumstances when you came into contact with the defendant on Thursday, September 30, 1976?

A He was responding to an ad I had for a motorcycle that I had for sale. He wanted me to bring the bike over to his house and at that time he said if he liked the motorbike he would purchase it. I declined that and said I would pick him up because he said he had no transportation but really was interested in the bike, and that he had cash to pay for it.

So, as a result of that, he gave

me his address. I went to his place. Upon getting there I recalled that I had some pictures of the bike, so I showed him the pictures from the briefcase that I had, and at that time he said that he really liked the bike, and that he really wanted the bike, and took out eleven hundred dollars, showed it to me and said that's what he had, and placed it on the back of the truck.

Q Did he tell you why or for what reason he wanted to purchase the motorcycle?

A Yes, he did. On the way to my place to show him the bike we started talking and he said he had had a bike prior to that but his brother had wrecked it, that he really wanted a bike, a chopped up custom bike, so that he really looked macho riding around, and going on

Collins Avenue driving a new bike and having people look at him and admire his bike and admire him on the bike.

Q What is meant by a "chopped up motorcycle"?

A Well, bikes come off the factory like cars, very custom, very standardized. You chop the bike, customize it, put a lot of chrome and money into it. I got the bike customized to a certain degree and he was going to further customize the bike, and get it chopped up, put customized paint on it, put his personal touch on it.

Q Did you then go back to your house and sell him the motorcycle?

A Yes, I did.

MR. TUNKEY: I will object to this. It is irrelevant and immaterial. It obviously comes at a time after the homicide

I cannot imagine---

THE COURT: Overruled, Counsel.

Q [By Mr. Adorno] What happened after you arrived back at your place?

A He immediately, without even starting the bike, fell in love with it, said he would take it; there was no question. He felt it was super and suited his purposes well.

Q What did you do after that?

A Well, we talked about the money and all, and settled on the price, and then we went to the bank, transferred the title or opened the title rather, and then we went to the auto agency and at that point transferred the tag. Now, he didn't want to go there and he didn't have the money to transfer the tag. He wanted to just leave it open and said he would take care of it when he got back home. But I loaned him the ten dollars

for the tag which he said he would reimburse me.

Q Did you then go to the tag agency?

A Yes. We went to the tag agency and we took care of all the things there and I paid the ten dollars for the transfer of the title and the tag.

Q Sir, then where did you go?

A Then we proceeded back to my house. I showed him a few things about the bike and things that had been done to it to customize it and then drove off.

Q Let me show you State's Exhibit No. 11 and ask you if you can recognize the motorcycle that is shown in there?

A Yes, I can.

Q Whose motorcycle, or where had you seen that motorcycle before?

A This is the motorcycle that was

mine that I sold to Washington.

MR. ADORNO: Thank you, nothing further.

MR. TUNKEY: No questions.

[Witness excused]

MR. ADORNO: Here is the rights that we can incorporate with the Meli confession.

THE COURT: I believe that is number twelve, yes.

MR. ADORNO: I will recall Dr. Wright.

Again, as the other two protocols, I will submit a copy of the protocol, of the autopsy of Frank Vincent Meli.

THE COURT: Make it the next exhibit, please.

MR. ADORNO: Same stipulation as to the doctor's qualifications as forensic---

MR. TUNKEY: Yes, sir.

[Thereupon, the document referred to was marked State's Exhibit No. 13, and received in evidence.]

Thereupon:

RONALD KEITH WRIGHT

was recalled as a witness on behalf of the plaintiff and, having been previously sworn, was examined and testified further as follows:

DIRECT EXAMINATION

BY ADORNO:

Q Dr. Wright, did you have occasion on October 1st, 1976, to go to 6520 Northwest 29th Avenue?

A Yes, I did.

Q And who summoned you there?

A The complaint desk, Public Safety Department.

Q Sir, what, if anything, did you do at that location?

A Ended up digging up the body of Frank Meli.

Q Sir, would you describe for the Court what you observed when you were finally able to dig down and find Frank Vincent Meli?

A At a depth of approximately two feet, six inches, behind the house, we found a blanket, blue in color, which appeared to be covering a body of a person who had died.

We carefully excavated at that point not to cause any injuries to the body, and removed the body from the scene.

Q Doctor, did you yourself take photographs that would depict that particular scent?

A Yes, I did.

Q Do you have that with you?

A Yes, I do.

Q Would you hand that to the Clerk and I will ask the Clerk to mark it for identification.

THE COURT: Any objection to it?

MR. TUNKEY: Same objection as previously, immaterial and irrelevant.

THE COURT: They will be overruled. Mark them as a composite, A, B, C, please.

[Thereupon, the photographs referred to were marked State's Exhibit No. 14, composite, and received in evidence.]

Q [By Mr. Adorno] Doctor, as we previously did, would you explain those photographs to the Court and the process that they show as you were digging up the body?

A All right. State's Exhibit 14-C shows the backyard just to the east of what appears to have been a clothesline support, the area which the excavation

was carried out. This area had external evidence of previous excavation insofar as there was a great deal of disruption at that point and pieces of grass had been pulled out.

Q Sir, go ahead.

A Again, 14-B shows the body as it was first being uncovered. Here is the blanket which covered the body and as you can see from the officer's leg, it measured two feet, six inches, to the top of the hip, and here is the body as uncovered in the grave itself, that being 14-A. That's the correct orientation. That shows the body as it was uncovered and the blanket having been pulled away.

Q Doctor, under your supervision was the body removed from the grave and transported to the medical examiner's office?

A Yes, it was.

Q Did you have occasion to perform an autopsy on Frank Vincent Meli?

A Yes, I did.

Q Prior to performing the autopsy, did you notice anything about his neck, hands or feet?

A Yes. About his neck was a terrycloth towel which was knotted about his head and also a length of brown extension cord, two-wire variety, about his right hand. There was ligature composed of the extension cord, appeared to be the same extension cord, again a brown two-wire extension cord, sixteen-gauge wire, about the ankle.

There was a section of bedsheet which had been torn and was present about the ankle. In addition to that about both arms there were areas of contusions or bleeding underneath the skin, bruising

underneath the skin in a linear pattern suggestive of, again, from the presence of the ligature, that the hands had been tied and were forced. There had been an attempt to free, he had attempted to free himself, thus bruising his hands in this lateral pattern.

Q Would you tell the Court what the results of your autopsy were?

A The results of the autopsy revealed that Frank Vincent Meli died as a result of multiple of stab wounds. There was total of eleven stab wounds to the body altogether.

Q Doctor, did you take pictures depicting those particular stab wounds?

A Yes, I did.

Q Do you have those pictures with you?

A Yes, I do.

Q Would you please hand them to me, please?

MR. TUNKEY: Judge, these are certainly repetitive to those pictures that were already introduced with respect to this case. I can conceive of no purpose for the introduction of these photos.

THE COURT: I haven't seen them.

MR. TUNKEY: I know, but I have to make my objection. Especially considering the rather gruesome nature of color photographs.

THE COURT: All right, sir. Your objection is overruled.

[Thereupon, the photographs referred to were marked State's Exhibit No. 15, composite, and received in evidence.]

Q [By Mr. Adorno] Doctor, let me show you State's Exhibit No. 15, composite,

A through I, and again by referring to the number and letter, would you describe to the Court the wounds that you found while performing the autopsy on Frank Vincent Meli?

A Photographs G and H show the ligature about the neck, being the extension cord, and the terrycloth towel about the neck.

F, B and C are photographs taken specifically to depict the absence of any defense wounds on the hands or arms of the deceased, Frank Meli.

Photograph I shows the stab wounds of the chest. There are five stab wounds in the right chest. There are five stab wounds in the left chest, and there is one stab wound of the upper bicep on the left-hand side of the body.

Photographs A, B and E, still

of composite 15, are taken to show the vital reaction to all these stab wounds. The areas of hemorrhage depicted in the opened right chest of photograph E, the external shot of the chest showing hemorrhage in photograph B and the external or just beneath the skin photographed in A, demonstrate that there was bleeding associated with all eleven of the stab wounds.

In other words, while each of these stab wounds was delivered, the deceased had a blood pressure capable of producing hemorrhage into these wounds.

Q Doctor, the stab wound, eleven stab wounds that you found on Frank Vincent Meli, would any of them have caused instantaneous or rather quick demise on behalf of the victim?

A The stab wound which in the protocol is described as stab wound F,

the stab wound which is located in the left chest just to the left of the mid-line, is a wound which would cause death in a matter of seconds, perhaps as long as a minute or so, because this stab wound was of the heart and introduced a condition which is known as cardiac tamponade, which is a condition in which there is bleeding into the sac around the heart which then prevents the heart from pumping.

Q Based on your examination, both externally and internally, were you able to determine where in the sequence of the stab wounds this particular wound to the heart occurred?

MR. TUNKEY: Objection, Your Honor. This is certainly a hypothetical question.

THE COURT: If you can answer.

MR. TUNKEY: I would like to make

sure that the answer will be phrased, Your Honor, to a reasonable scientific certainty, not some probability or guesswork.

THE COURT: Reasonable medical certainty, please, Doctor.

A I cannot answer that question without supplying another factor into the hypothetical.

Q [By Mr. Adorno] All right, sir, what would that factor be?

A It would be possible if all the wounds were delivered, all the ten additional wounds after the one which was so rapidly fatal, some seconds, perhaps as long as a minute, it would be possible to deliver all of the wounds within that period of time. The thing which I can say was that he was alive during the entire, every one of the stab wounds

delivered.

Q What do you have that you can base that result on?

A Again, the presence of the hemorrhage in every one of the wounds means that he was alive and indeed insofar as that hemorrhage indicates that he had a blood pressure. It indicates that he was conscious during that period time when every one of those eleven stab wounds was inflicted.

Q Doctor, did you notice anything unusual about the eleven stab wounds you found on Frank Vincent Meli?

A Yes.

Q What was that?

A The stab wounds in the left chest are all parallel. The stab wounds in the right chest are all parallel to the ones in the right chest, having some right to left orientation. The stab

wound in the left bicep is parallel with the stab wounds in the left chest. This is highly unusual in the stab wounds for it indeed indicates that the deceased did not change his relationship to the knife during the point in time he was being stabbed.

Q Doctor, did you have occasion to go inside the house?

A No, I did not.

Q Doctor, did you find any evidence that the victim in any way struggled at the time that he was being stabbed to death?

A There was no evidence of any kind of defensive reaction. There was no evidence of moving the body at any time during the stab wounds. The other factor of importance here in regard to motion of the body is that ordinarily in stabbings,

stab wounds tend to assume a "V" shape on the skin due to the fact that the person moves and the track that stab wound takes coming out is slightly different than the track going in, giving a double wound. None of these wounds showed that.

Q Doctor, let me show you what has already been received in evidence as State's Exhibit, composite, 3-B and 3-A. Can you demonstrate for the Court how those stab wounds were different from the ones you found on Frank Vincent Meli, if they will assist you at all with respect to the knife being withdrawn from the body?

A The stab wound here as depicted in 3-B shows this two-component, almost what appears to be a double-stab, and the reason for this is generally a movement of the body, of the person when the knife is being withdrawn. Again, to show the internal relationship, obviously these

pictures do not show the inside.

Q Doctor, did you find anything in your examination that would have been consistent with the victim's hands being tied either behind him or spreadeagled at the time he was stabbed to death?

THE COURT: Is the term "consistent" or "inconsistent"?

Q [By Mr. Adorno] Did you find anything that would be consistent with the victim either having his hands tied behind his back or hands tied spread-eagled and otherwise incapacitated at the time he was stabbed to death?

A Yes.

Q What were those items?

A Number one, there was still present about the hands a ligature at the time when I examined the body. They were at that time not attached to both hands.

Number two, there was evidence that, of bruising to the skin with Frank Meli attempting to free himself from these bonds with sufficient force against them that it had caused bruising to the skin.

Number three, there was the presence of the wound here to the left bicep. Once hands are tied behind the back, this area is less than one inch from the closest stab wound of the left chest. All of these stab wounds of the left chest are clustered here along the left side. This wound is exactly parallel when the arm is behind the back in the position I indicate with the stab wounds of the chest. And, finally, the last thing being, two more things, the parallel nature of these wounds, first of all the ones to the chest, left chest being straight down; the ones to the right chest

having a slight left to right orientation on the body of Frank Meli measured from his right to left and the lack of this double "V" shaped wound, externally, all point to the fact that he was incapacitated.

Q What was the cause of death of Frank Vincent Meli?

A Multiple stab wounds.

Q Did he basically bleed to death?

A Yes.

MR. ADORNO: Nothing further.

THE COURT: Any cross?

MR. TUNKEY: Nothing.

MR. ADORNO: At this time, the State has not further witnesses to present. I will have marked for identification the defendant's rap sheet. I will ask that be marked.

MR. TUNKEY: I object, Your Honor. I

most certainly object.

THE COURT: I shall sustain the objection as to the rap sheet.

MR. ADORNO: The only other thing that I want to mention is that I would like the Court to take notice of the plea as to the battery on the police officer that occurred in this court on October 13, 1976. Other than that the State has no further evidence to present.

THE COURT; Do you want a few minutes before you put your case on?

MR. TUNKEY: Your Honor, I would like to amplify that I object to Mr. Adorno's comment that he wants to introduce a so-called rap sheet and would move at this time to in effect enter an order of mistrial insofar as these proceedings are concerned. I believe that the State's comments are so inherently prejudicial

that the Court could not fairly decide the issues before it. It certainly goes to one of the factors to be determined by the Court in passing sentence.

THE COURT: There is an appropriate manner for establishing other convictions and this is not it, and accordingly I granted the motion. It need not be handled in any mistrial. I don't find that to be an aggravating circumstance based upon what they brought in. Do you want some time before you put on your case?

MR. TUNKEY: I would like to have perhaps ten or fifteen minutes, Your Honor.

THE COURT: Twenty-five minutes after three.

We will adjourn at this time until then.

MR. TUNKEY: May I speak with Mr. Washington in the jury room, Your Honor?

THE COURT: Yes, sir.

[Thereupon, a recess was taken,
after which the following proceedings were had:]

THE COURT: All right, gentlemen,
let's go.

MR. TUNKEY: Judge, we will adopt
the testimony of last Wednesday, given
at the time of the plea. We will offer
no additional testimony at this time.

THE COURT: All right, sir. Does
the State have a memorandum that it wanted
me to consider?

MR. ADORNO: Yes, Your Honor.

THE COURT: I am not opposed to
hearing brief argument by counsel. Of
course, the facts are recent in mind, but
perhaps you might want to argue some
questions of law, either of you, and if so
I will be more than pleased to give you

some brief period of time for that purpose.

MR. ADORNO: Mr. Gerstein was going to make that argument to the Court and he has not come back into the courtroom. I beg the Court's indulgence for a couple more minutes. May I go outside and see if I can find him?

THE COURT: Yes, sir. The same rule applies for him as it does for anybody else.

I am advised, Mr. Gerstein, that you wanted to make some observations relative to the closing. You weren't here but as I advised counsel, I am relatively familiar now with the facts of this case, but I will be more than glad to hear from both sides as to questions of law or interpretation which you would like to make.

MR. GERSTEIN: Does Your Honor desire

to hear from the State first?

THE COURT: Yes, Sir.

MR. GERSTEIN: If Your Honor please, this is a case in which capital punishment, the death penalty, is as warranted as any factual situation that will ever appear before Your Honor and is warranted under the statute setting aggravated circumstances as any situation that will ever appear before Your Honor.

This defendant has left in his wake a trail of human destruction involving three dead persons, a woman who is partially blinded, another woman who is in a coma and who, according to the medical testimony, will be nothing more than a vegetable. He has left a series of people shot and stabbed while he carried out murder and robbery and kidnapping.

When the People of the State of

Florida, through their elected representatives, established the death penalty, it certainly was with this kind of crime in mind. Nothing occurs to me that would adequately punish this series of events other than the death penalty.

In recent days, we have seen the media give a great a deal of attention to the plight of persons who face the death penalty. We have seen relatively little attention given to the plight of victims and their families. It is especially true in this situation.

I was especially moved by the circumstances involving the final victim, who was a young student, some twenty years of age, who was working his way through college by holding down two jobs, who had planned to become a tax lawyer, who was helping to support his family, who had been left without a father because

his father was killed in the service of his country overseas.

He became the last victim in a chain of horror stories that has rarely been exceeded in this community and he became the last victim as a result of the defendant's total greed.

There is a portion of the confession in connection with the stabbing and killing of Frank Meli that is horrendous. The question is posed to the defendant, "When you say you put a pillow over his face, what for?" The answer is "He--" referring to Meli, "--when we got into it, he just start hollering when I stabbed him. When I stabbed him, that's when he started hollering. Then he just kept on hollering. Then when he stopped hollering, he just start moaning real loud. Then he start saying the Lord's Prayer, Said it three or four times, over

and over." It comes from page 15 and 16 of the defendant's statement.

It seems to me, Your Honor, that of the aggravating circumstances set out in the statute, six of the eight aggravating circumstances would apply to the final homicide, to the one from which that statement in the confession is taken. The defendant himself concedes through counsel that two of the aggravating circumstances apply to all of them; that's conceded; that is that all three killings were during the commission of robberies or kidnapping, that they were for money. We respectfully submit that Meli was killed to keep him from identifying his assailants, to frustrate the enforcement of the law, since there would be no identity; that it was especially cruel and heinous and atrocious. I have examined the mitigating

circumstances and I don't find one within the statute that would warrant any sympathy, any consideration, any leniency, any mercy from Your Honor or from anyone else.

I don't know what we can do stop this kind of thing in this community but I do know that the people of this State have enacted a law that calls for capital punishment, the death penalty, in certain instances and in certain crimes. I do know that it is high time that we had some of the same concern for the victims of crime and their families that we continually exhibit for defendants in this State and in this country. No one is going to compensate the victim of this crime or his family and there is little that we can do except to see to it that there is some justice and we can do that

by seeing to it that the death penalty is assessed in this case.

THE COURT: Mr. Tunkey?

MR. TUNKEY: Your Honor, just briefly.

Obviously, as set forth in the memorandum which I have provided the Court, I disagree with Mr. Gerstein's assessment as to the balance between the aggravated and the mitigating factors. However, I believe that without even getting to that determination that this Court has before it a defendant who, yes, by his own admission, has committed a series of crimes which by their nature are the most serious proscribed by the laws of the State. He has confessed, not through any coy, cunning design to avoid the imposition of the death penalty, but rather knowing full well that this Court could, in fact, impose that penalty.

I suggest to this Court that this Court has an alternative in this instance without resorting to the ultimate penalty which man can impose and that is to sentence this defendant to a term of three consecutive life sentences in the state penitentiary, each of which to run with no parole for twenty-five years, thus insuring that for a minimum term of 75 years--the defendant at that point would then be, if he were to be living, 101 years old--would then have further sentences that could be imposed as to the lesser counts contained in the indictments and/or the information to which he has already entered a plea of guilty before this Court.

Neither philosophically, morally or religiously do I agree with the concept of the death penalty. I do not believe

that that is what is important here. Mr. Gerstein says that the people of this state have voted for the death penalty, i.e., through their legislators. I do not know that the people of this state have ever voted for the imposition of the death penalty.

I think the Court will recall David Washington when he testified on Wednesday--I cannot tell the Court and I don't know that the Court knows itself what possesses any person, whether it is David Washington or anybody else, to commit a series of acts like this, and yet the Court knows that he is a living, breathing human being with some degree of intelligence, with the ability to express himself and even though, obviously, the acts which he committed were atrocious or terrible he also possess somewhere within him a spark which is good, which is decent.

There are obviously others in the past who have come before judges about to be sentenced for crimes as serious, perhaps more serious, who have been given the opportunity one way or another to live out their lives, whether it be in prison or after being in prison and back in society, who have been productive members of society, whether that be in a prison or elsewhere. I suggest to the Court that David Washington is not different when you go back and talk about a Leopold and Loeb case or Birdman of Alcatraz case, somewhere within this man, I suggest to this Court, there is a spark which deserves the chance to expire naturally.

Whatever punishment he is going to receive in the hereafter, he is going to receive, whether this Court gives him the death penalty or not.

I simply ask this Court not to

interpose the judgement of the hereafter but to let this defendant serve out his natural life in prison. The people of the state can be assured that he is no longer a threat. The people of the state can be assured that David Washington is not going to be on the streets; that David Washington is not going to commit crimes. On the other hand, the people of the state do not have to have the moral judgment or the religious judgment on their hands of having taken a human life.

I ask this Court from the bottom of my heart and on behalf of David Washington who I have represented for some months now to impose consecutive sentences of life in the state penitentiary with no parole for twenty-five years as to each of those consecutive sentences.

MR. GERSTEIN: May I in rebuttal

respond very briefly?

THE COURT: Yes, sir.

MR. TUNKEY: Your Honor, I am going to object.

THE COURT: I will hear it. If you want to make further comment, Mr. Tunkey, I will hear you.

MR. GERSTEIN: Mr. Tunkey says that the People of State of Florida have never voted for capital punishment. I don't know how the people of this state establish laws other than through their elected representatives, since we do not submit our laws to public referendum before they are enacted. They are enacted through elected representatives.

I won't attempt to play God and say whether or not there is a spark of anything that's decent within this defendant, save to express my firm conviction to Your HOnor that if there is a spark of

anything that is decent within him, he has not exhibited it at any time in any of the things that have been related to this Court. There is nothing of human decency that was exhibited at any time by him. And further, I have listened carefully to Mr. Tunkey as he speaks of the hopes and aspirations of this defendant, and I reiterate to Your Honor what about the hopes and the aspirations of the victims and their families? I don't know what the future will hold. I don't know whether the law that says this defendant cannot be paroled within 25 years will always be the law in this state. I don't know what this defendant will do in prison. But I do know that the people have provided one form of punishment that is the appropriate punishment, and the only appropriate punishment for these crimes.

THE COURT: Anything else, Mr. Tunkey?

MR. TUNKEY: No, Your Honor. I have made my comment.

THE COURT: The Court has before it the four different cases, all of which were pled by Mr. Washington, I believe it was last Wednesday. The Court's feeling relative to the other counts that are contained, and I will ask Mr. Washington at this time if he would please rise for the purpose of sentencing with his counsel, as relates to those counts that are contained, Miss Clerk, in the information and the three indictments that have been filed, other than that of first degree murder, it is the judgment of the Court that his plea is acceptable and he would be exposed to the maximum which could be assigned by the statutes for those other crimes that have been involved,

other than the first degree murder counts.

Now, we have listened to the testimony today and, of course, to Mr. Washington's discussion with us last week, and counsel's questions to the one witness relative to the question of forgiveness which, of course, is not mine nor is it the victims' and whatever forgiveness Mr. Washington will receive he will receive it with his own maker based upon the confession and the opening of his heart that he has done last week.

I am a symbol of the law of this State and it is my responsibility under that authority to enter that judgment which I think is appropriately called for by the facts and the law, and I find that in this case that there are sufficient aggravating circumstances existing, in that there are not sufficient mitigating circumstances which would in any way overrule

those aggravating circumstances, and, accordingly, it is the sentence of the Court that the death penalty be imposed on each of the three cases to run consecutive for the purposes of appeal review; that Mr. Washington be taken into custody by the Department of Criminal Rehabilitation, and that such sentence be imposed as is appropriate, consistent with the law.

Now, of course, under Article V, Mr. Washington, Section III of the Florida Constitution, the Florida Supreme Court will directly hear whatever appeal there may be as to the findings of the Court concerning the sentence. I do not know whether or not there is presently pending a conflict with the Public Defender's Office. In the event that there still exists, of course, we will appoint Mr. Tunkey for the purpose of filing the

appellate procedures and if then he refuses, by appropriate motion, we will make such further appointment as is appropriate.

MR. TUNKEY: I will ask there be a joint appointment. First of all, I don't know whether or not the conflict still exists either, but I presume that it does since the Public Defender's office still represents Mills. However, I would ask if, in fact, that is the case, that the Court appoint Mr. Bruce Rogow as lead counsel for any appeal with respect to the sentence which the Court has just passed and that I be appointed co-counsel.

THE COURT: I am not familiar--it may be that I know Mr. Rogow, but it does not ring a bell, but if you would be good enough to bring him by, I would be glad to interview him and to make certain that

Mr. Washington's appellate rights have been protected.

I compliment all counsel for their attendance upon the Court and the preparation of their cases.

[Thereupon, the sentencing was concluded.]

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CERTIFICATE OF REPORTER

I HEREBY CERTIFY that the foregoing pages, numbered from 1 to and including 165, represent a true and correct transcription of my shorthand report of the sentencing in the above-styled case.

Dated at Miami, Florida, this 28th day of January, 1977.

Larry Gryniowski

EXHIBIT NO. 1

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, CRIMINAL DIVISION
FLORIDA

THE STATE OF FLORIDA, :
Plaintiff, : CASE NO. 76-8300
76-9542
76-9543
vs. :
DAVID WASHINGTON, :
Defendant. :
: MEMORANDUM RE:
SENTENCING

THE DEFENDANT has tendered to the Court and the Court has accepted the Defendant's pleas of guilty to the Indictments styled in the above-styled cases.

Pursuant to the entry of said plea, and the waiver by the Defendant of a jury recommendation as to sentencing, the Court is the ultimate finder of fact as to the requirements of law which are set forth in Florida Statute 921.141.

Florida Statute 921.141(5) sets forth aggravating circumstances which may be considered by the Court in determining the penalty to be imposed upon the Defendant. It is the contention of counsel for the Defendant that subparagraphs a, b c, and g of Florida Statute 921-141(5) do not apply to any of the above-styled cases. Subparagraph c of this Statute may be said to be applicable to the facts alleged in the Indictment in case number 76-9543, but not to the facts alleged in either of the other two Indictments. Counsel must concede that subparagraphs d and f of said Statute appear to apply to each of the Indictments to which the Defendant has entered pleas of guilty. Lastly, as to aggravating circumstances, subparagraph h of Florida Statute 921.141(5) may conceivably be applicable to the facts alleged in support of the Indictment filed in case number

76-8300.

Florida Statute 921.141(6) provides that certain mitigating circumstances may exist to offset the aforementioned aggravating circumstances. Counsel will concede that subparagraphs c, d, e, and f do not appear applicable to the facts in any of the above-styled cases.

However, it is the contention of counsel for the Defendant that: a) the Defendant has no significant history of prior criminal activity; b) the Defendant was acting under the influence of extreme mental or emotional disturbance at the time that he committed the acts complained of in the above-styled cases, and; c) that the Defendant's age is such that a sentence of imprisonment for life in the State Penitentiary with no parole for anywhere between 25 and 75 years, depending upon

whether sentence is rendered in the above-styled causes are consecutive or concurrent, would both severely and adequately punish the Defendant for the crimes complained of and would insure society that the Defendant would not ever again become a threat to the community.

It is the position of counsel for the Defendant that the aforementioned aggravating and mitigating circumstances are nearly balanced, one against the other. However, it is felt that two additional factors should be considered by the court in its entry of sentence in these cases. The first of these is that the Defendant has at no time since his arrest attempted to escape justice. The Defendant initially surrendered to the police and immediately thereafter, confessed his culpability as to each of the allegations contained in all of the above-styled cases. The

Defendant did this both immediately subsequent to his arrest and has entered pleas of guilty to this Court and has freely admitted a desire to confess his guilt. The second consideration which counsel feels should be taken into account in passing sentence is the fact that the Defendant has indicated a willingness and a desire to testify either before a Grand Jury or a trial jury with respect to co-defendant, Gary Mills. This desire of the Defendant is part of no negotiation with the State of Florida has been sincerely offered by the Defendant solely from a desire to see that the truth concerning the allegations in the above-styled cases be brought out in a court of law.

WHEREFORE, counsel petitions this Court after careful consideration of all relevant factors as to sentencing to impose a sentence other than death against

the Defendant, DAVID LEROY WASHINGTON.

Respectfully submitted,

POLLACK TUNKEY, ROBBINS
& ROSENFELD
1700 N.W. 7th Street
Miami, FL 33125
Telephone (305) 642-9996

BY

WILLIAM R. TUNKEY, ESQ.

DECLARATION (EXHIBIT 2)

I, Lulu Parham, hereby declare under pain and penalty of perjury:

1. I am David Washington's grandmother and live Blountstown, Florida.

2. When David was growing up, he lived with me for many years.

3. David was a quiet boy. He never cursed in front of me, never smoked or drank and never raised his voice to me or talked back to me.

4. He was always helpful around the house when he was a young boy. While I was working, he would clean the house, wash clothes and cook meals for us.

5. When I became disabled in 1968, David would often skip school and work to get money for me, since I was not able to work.

6. About the time of the crimes, David

was very uptight about not being able to find a job. He often came to me, crying and saying he didn't know what he was going to do. He needed money for his family and couldn't find a job. He just seemed under a lot of pressure at this time and felt like his wife and child were suffering because he couldn't find a job.

7. When I saw David after he was arrested, I think he felt a lot of remorse, because he was crying and said he was sorry, but he had been desperate and panicked.

8. Everytime I see him now, all he does is cry and say how sorry he is.

9. I would have been willing to testify for David, but no one ever contacted me.

DATE: September

9, 1980

SS: LULU PARHAM

DECLARATION (EXHIBIT 3)

I, Julia Taylor, hereby declare under pain and penalty of perjury:

1. I am David Washington's mother and I live in Blountstown, Florida. I am presently the dietary supervisor at the Apalachicola Valley Nursing Home in Blountstown.

2. David was always a good, quiet boy and was peaceable and nonviolent. When David was young, his stepfather went to bed with one of my daughters. I think that got to David.

3. He always helped around the house and would get odd jobs to make sure his brothers and sisters had lunch money.

4. Shortly before the murders, David used to come over to my house in Miami a lot and cry and borrow money. I kept asking him what was wrong and he told me

he needed money for food and pampers and stuff, but he couldn't find any jobs.

5. One night around this time he came to me crying and told me he didn't know what he was going to do. His babies needed milk and he didn;t have any food for them. He told me he wanted to buy clothes for them, but his unemployemnt ran out, and he couldn't find a job. He told me he was tired of living like this. He seemed under a lot of pressure and was worried about his family.

6. I would have been willing to testify for David, but I was never contacted by anyone.

Date: September
9, 1980

SS: JULIA TAYLOR

DECLARATION (EXHIBIT 4)

I, Clarence Morgan, hereby declare under pain and penalty of perjury:

1. I am a younger brother of David Washington.

2. I am presently living in Blountstown, Florida.

3. I am a veteran of the United States Army and I served in Vietnam.

4. David always helped support me and my brothers and sisters when we were kids. He was always doing odd jobs to make sure we had lunch money and school clothes.

5. David always told me to stay out of trouble and "to keep my nose clean." He often kept me out of trouble when I was headed that way.

6. When I got out of the service after returning from Vietnam, I was using a lot of drugs. David spent a lot of time

talking to me then. He was always against drugs and talked me into getting into a program with the V.A. clinic in Miami. I stopped using drugs because of the support and help I received from David.

7. David was under a lot of pressure prior to the murders. He wasn't his usual self at this time and he didn't know what really to do. Everything was going bad for him. He had applied for jobs at a lot of places, but was unable to find anything.

8. I would have been willing to testify for David, but I was never contacted by anyone.

Date: September
9, 1980

SS: CLARENCE MORGAN

DECLARATION (EXHIBIT 5)

I, Renee Reed, hereby declare under pain and penalty of perjury:

1. I am an older sister of David Washington and am presently living in Blountstown, Florida. I am employed at the Apalachicola Valley Nursing Home.

2. David always helped my mother put us through school when we were younger. He used to do odd jobs to help buy clothes for us to make sure we had lunch money. He would stay out of school and babysit for us too, so my mother wouldn't have to find a babysitter.

3. David really helped me when I was growing up and tried to show us the right way to go. He always warned us about prisons and told us to stay out of trouble. He guided us straight when we were kids.

4. David tried to be friends with

everybody. I never saw him get into any fights, and he never seemed to have any enemies.

5. I would have been willing to testify for David, but was never contacted by anyone.

Date: September
9, 1980

SS: Renee Reed

DECLARATION (EXHIBIT 6)

I, Diane Taylor, hereby declare under pain and penalty of perjury:

1. I am a younger sister of David Washington and am presently living in Blountstown, Florida.

2. David used to always help support my family when my sisters and brothers and I were younger. He would do odd jobs in the neighborhood to make sure that we had lunch money or school clothes. When my stepfather wouldn't give us any money or our electricity was cut off, David would always go out and help by getting work..

3. David used to always tell us kids to stay out of trouble. He was always making sure that we didn't do anything that would get us into trouble.

4. David was always cheerful and friendly, nice to everyone. He wouldn't ever get

into fights, except for one time when he tried to break up a fight that my brother, Nathaniel Taylor, was in.

5. I don't know whether David knew about it, but when I was a kid my step-father used to make sexual advances to me on a number of occasions.

6. I would have been willing to testify for David, but no one ever contacted me about his case.

DATE: September
9, 1980

SS: DIANE TAYLOR

DECLARATION (EXHIBIT 7)

I, Gilbert Newkirk, hereby declare under pain and penalty of perjury:

1. I live at 8016 N.W. 10th Avenue in Miami, Florida.

2. I saw David frequently before he was arrested for murder and always found him to be a peacable and non-violent person. In fact, David was always real quiet around me.

3. David worked for me between 1968-1971, unloading tractors at the freight delivery department of Seaboard Airline Railroad in Miami. He was a very good worker for me, but he eventually had to be laid off along with several other employees.

4. I was always struck by the fact David never cussed in front of me and never drank, smoked or used drugs even

though there seemed to be a lot of pressure on him to do so.

5. I would have been willing to testify about David's background, character and personality, but I was never contacted or interviewed by anyone in connection with the case.

DATED: September 5, 1980

SS: GILBERT NEWKIRK

DECLARATION (EXHIBIT 8)

I, Virginia Snyder, hereby declare under pain and penalty of perjury:

1. I am a private investigator whose office is located at 38 South Swinton Avenue, Delray Beach, Florida. I was hired by Richard Shapiro, the attorney for David Washington, to investigate the background and personal history of Mr. Washington.

2. As part of my investigation, I attempted to obtain information about David's former employment.

3. On June 24, 1980, I contacted Associated Grocers of Florida, 6695 N.W. 36th Avenue, Miami, Fla., and talked with Mrs. Ruth Tyson in personnel. She advised me that David worked there from June 30, 1971, to January 16, 1972, and again from April 23, 1972 to May 9, 1972. She

indicated that David was satisfactory employee.

4. I have also verified that David worked at Burdines in Miami from February 19, 1973 to May 23, 1973 as a seasonal employee in the stock room. He went to work for the Miami Department of Solid Waste the following month. From there, he went to Food Fair in Miami where he remained until May 1, 1975, when he was laid off for lack of work.

DATED: September
9, 1980

SS: VIRGINIA SNYDER

DECLARATION (EXHIBIT 9)

I, Norman Cox, hereby declare under pain and penalty of perjury:

1. I live at 1634 N.W. 85th Street in Miami, Florida.

2. I am presently the band director at the Edison Senior High School in Miami and was formerly the director at Smith-Brown High School in Arcadia, Florida when David Washington attended school there.

3. David used to play snare drums in the Smith-Brown High School Band.

4. I recall that David was always a very fine young man, an outstanding leader in the band. He was always cooperative and dependable, well-liked by the other band members.

5. I was shocked to learn recently that David was on death row on Florida,

because the commission of murder is so totally out-of-character with what I knew about David Washington. He was always so peaceable and nonviolent, even though I always thought that his life was tragic. Yet David was obedient and seemed to be a religious youth, who was never involved in any fights with the other kids.

6. David was also a member of the Mount Zion AME Church in Arcadia and sang in the youth choir there. He also seemed to be liked by members of that congregation.

7. I would have been willing to testify about David's background and character, but I was never contacted by anyone in connection with David's case.

DATED: September
5, 1980

SS: NORMAN COX

DECLARATION (EXHIBIT 10)

I, Theron Carson, hereby declare under pain and penalty of perjury:

1. I was the president of the Greater New Bethel Baptist Church in Opalocka, Florida at the time that David Washington participated in the choir for about two years.

2. David was an active member of the church choir in 1976 and attended rehearsals regularly. Even when he had to miss rehearsals, he was conscientious enough to come by and see what he had missed. He often volunteered his services to raise money for the choir, selling eggs or participating in car washes. David was dependable and reliable and I knew he would do his job.

3. David was very helpful and cooperative and always appeared to be friendly,

peacable and non-violent. I always viewed him as a respectful, helpful and caring person. I remember on one occasion we had an anniversary for the choir and David had eagerly volunteered his help in the cooking for the group.

4. I was shocked when I read of David's participation in murder, since it seemed so completely out of character for the David Washington I had known and had worked with. I couldn't believe it was the same individual.

5. When the Choir was not singing at the church, I frequently saw David attending church services anyway.

6. I was in a position to provide evidence regarding David's background, character and personality, but I was never contacted or interviewed by anyone in connection with David's case.

DATE: September
5, 1980

SS: THERON CARSON

DECLARATION (EXHIBIT 11)

I, Judge Alexander, hereby declare under pain and penalty of perjury:

1. I live at 13350 Aswan Road, Apt. 317, in Opalocka, Florida.

2. I am director of the 70- to 80-member young adult choir at the Greater New Bethel Baptist Church in Opalocka, Florida.

3. I knew David Washington for two or three years before he was arrested, when he was a member of our church choir.

4. David was a dutiful, cooperative, mild and sweet boy when he was a member of the choir. David was dependable and reliable. He always willingly and diligently participated in fundraising activities for our choir.

5. I never saw David get mad or lose his temper and he always appeared to be a non-violent person.

6. I was very surprised when I saw David's name in the newspaper in connection with murders. My immediate reaction was to think that it was a mistake. I felt sorry for David as I knew he would be embarrassed by his name appearing in these articles.

7. I still cannot believe that the David Washington I knew could do the things he has been convicted of.

8. I would have been willing to testify about David's reputation and character, but I was never interviewed or contacted by anyone in connection with his case.

DATED: September
8, 1980

SS: JUDGE ALEXANDER

DECLARATION (EXHIBIT 12)

I, Wilene Robinson, hereby declares under pain and penalty of perjury:

1. I live at 4020 N.W. 191st Terrace in Miami, Florida.

2. I am the church secretary of the Greater New Bethel Baptist Church in Opalocka, Florida.

3. I knew David Washington for sometime when he was a member of the young adult choir of our church and regularly attended church services.

4. David always appeared to be a peaceable, cooperative, non-violent person. I always found him to be respectful, reliable and trustworthy. David had a reputation in the church for being helpful and dependable in the church choir.

5. I was shocked when I learned about the murders, because it seemed so out-of-

character with the concerned and involved person I had known at our church.

6. I would have been willing to testify about David's reputation and reputation and character, but I was never interviewed or contacted by anyone in connection with his case.

DATED: September
5, 1980

SS: WILENE ROBINSON

(EXHIBIT 13)

JESSE TROUPE:

[FIRST SIX PARAGRAPHS OMITTED FROM ORIGINAL]

During this time, he used to come over to the house and borrow money from me. Sometimes, he was so hungry that my wife would fix a sandwich for him or give him a meal.

7. I felt very sorry for David and his family at this time. The lights and water in their house and had been cut off, and his wife had moved out of the house. They had no money for food and David had drawn his last unemployment check.

8. I was completely surprised when I found out that David had been charged with murder, because he had always been such a peaceable and nonviolent person. In fact, based on my experience and contact with David, there is nothing really bad I could say about him. My wife, sons and daughters,

who all know David, have told me that they feel the same way about David.

9. We have discussed David and would have been willing to testify on David's behalf, but we were never contacted or interviewed by anyone in connection with the case.

DATE: September
5, 1980

SS: JESSE TROUPE

DECLARATION (EXHIBIT 14)

I, Cappie Martin, hereby declare under pain and penalty of perjury:

1. I live at 2830 N. W. 66th Street, in Miami, Florida. I have lived at that address for 20 years.

2. David Washington used to live with his parents across the intersection from where I live. David was already living there when we moved in. During the 16 years that I lived near David, I had an opportunity to observe him almost every day as he was growing up.

3. David always impressed me as a nice boy. He was very polite and courteous to me. He never appeared to have any problems with the other kids in the neighborhood. I never heard of him getting into fights or other trouble.

4. David was also a helpful youngster.

He was the kind of boy who would volunteer to help me carry groceries or other packages whenever he saw me having difficulties.

5. I was very surprised when I saw David's name in connection with the murders. I thought it must be some mistake because it was so out-of-character for the David Washington I knew.

6. I would have been willing to testify about David's reputation and character, but I was never interviewed or contacted by anyone in connection with his case.

DATED: September
5, 1980

SS: CAPPIE MARTIN

DECLARATION (EXHIBIT 15)

I, Leonard Brady, hereby declare under pain and penalty of perjury:

1. I live at 3872 N. W. 176 Terrace in Miami, Florida.

2. I am presently employed as a Lieutenant with the Dade County Safety Department.

3. Prior to 1976, I used to see David Washington on an average of three times a week for approximately ten years.

4. I was very surprised when I learned that David had confessed to murders, because I thought that it might have been Nathaniel Taylor, David's brother, who had committed the crimes. In fact, my first reaction when I heard David had turned himself in and confessed to murder was that he was covering up for his brother. It was perfectly in keeping with David's

personality to cover for his brother, even to going to the electric chair for him. I still find it hard to accept the fact that David committed the murders as opposed to his brother.

5. David was always a peacable and non-violent person who appeared to be respectful and caring. I am very protective of my children and yet I always trusted David with my children. I have also found David to be reliable and trustworthy, as it relates to any dealing with me.

6. In all of the years that I have observed deviant behavior as a police officer, I have never seen anyone do something like David has done, with the history and character that David has.

7. I would have been willing to testify on David's behalf about his background, character and personality at the time of sentencing, but I was never contacted or interviewed by anyone at that time in connection with David's sentencing.

DATED: September
8, 1980

SS: LEONARD BRADY

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT
OF FLORIDA

No. 81-722-Civ-CA

DAVID LEROY WASHINGTON,)
)
Petitioner,)
)
vs.)
)
CHARLES E. STRICKLAND,)
Superintendent,)
)
Respondent,)
)
and)
)
THE ATTORNEY GENERAL OF)
THE STATE OF FLORIDA and)
LOUIS WAINWRIGHT,)
)
Additional)
Respondents.)
)
-----	-x

United States Courthouse
300 Northeast 1st Avenue
Miami, Florida
Friday, April 10, 1981
1:40 p.m.

The above-entitled cause came on for
writ of habeas corpus before the Honorable
CLYDE ATKINS, [Chief] United States District
Judge.

THE CLERK: Case No. 81-722-Civ-CA, David Leroy Washington versus Charles E. Strickland and the Attorney General of the State of Florida and Louis Wainwright.

MR. SHAPIRO: Richard Shapiro for petitioner, David Leroy Washington, and with me is local counsel, Mr. Lipman.

MR. FOX: Calvin Fox, Assistant Attorney General and Joel Rosenblatt, Assistant Attorney General for the respondents, your Honor.

* * *

MR. FOX: Your Honor, I have certain preliminary announcements I would like to make to the Court before we get underway with the hearing itself.

Just for the purpose of the record, your Honor, in light of the manner in which this proceeding came to the Court, I would like to announce that we do object

to the proceeding and we submit that the delay by the defendant in this case constitutes an abuse of the writ and that the proceeding herein can be rejected on the face of the record as we alleged in our original response.

We would urge this Court to examine what the defendant hopes to accomplish, the maximum he can accomplish, and that is he would have the opportunity to present two non-statutory mitigating circumstances.

The State, at the same time, would have the opportunity to add two statutory aggravating circumstances to their already vast array of statutory aggravating circumstances in this case.

In summary, your Honor, we submit that what the defendant does challenge is whether or not the death penalty in

this case was appropriately applied and we would submit that under the circumstances, this is not an appropriate Federal question.

Relying on Profitt vs. Florida, we would submit that there is no Federal question involved under these particular circumstances.

Finally, we would submit that the defendant has failed to meet its burden on the face of the pleadings. The burden herein is clearly upon the defendant and would rely on Davis vs. Alabama, 596 F.2d 1214 and it was on remand at 623 F.2d 356 and Cooper vs. Fitzharris, 586 F.2d. 1385.

As the Court has observed the findings of the State Court in this instance are presumed correct, and we would submit the rule of the Florida Supreme

Court and order of the trial court in this case are correct, and that no further proceedings are warranted.

[Objections noted by the Court].

[By the Court]: Are we ready to proceed?

Mr. Shapiro, do you have anything that you want to present?

MR. SHAPIRO: Your Honor, because of the circumstances under which the hearing was scheduled, I was not able to obtain any of the other witnesses that I might want to present at such a hearing.

THE COURT: Well, you have those affidavits and I am going to assume that they would have testified as set forth therein.

MR. SHAPIRO: Yes, but they are not exhaustive of the people that could be called and within the affidavits, the testimony of the witnesses could actually

amplify upon some of the statements in the affidavits.

The purpose of submitting the affidavits were not as a substitute for their live testimony, but illustrative of what their testimony would be.

* * *

MR. SHAPIRO: Just so the record is clear, I just want to note my objection with respect to the inability to present other witnesses because of the time factor.

THE COURT: You wanted a prompt hearing, did you not?

MR. SHAPIRO: Yes, your Honor, and I appreciate the Court's willingness to schedule a prompt hearing and to move this matter as quickly as possible.

I also, on the other hand, am concerned about insuring that I have an opportunity to present all the evidence in support of my client.

THE COURT: There was some fifteen affidavits filed.

Is that the number?

MR. SHAPIRO: Yes, your Honor.

THE COURT: I would assume they would testify as set forth therein.

MR. SHAPIRO: All right. Thank you, your Honor.

* * *

(By Defense Counsel):

Q Do you recall when you were appointed to represent David Washington?

A It was some time in the first week or so of October and the year was 1976.

Q Do you recall at that time what case you were appointed to represent Mr. Washington on?

A I think I even remember the number, 76-7600 and it involved the death of a person named Meli.

Q After being appointed to the case, what pre-trial preparations did you undertake for the legal representation of Mr. Washington?

[Objection overruled].

A My recollection of it and, of course, I am not certain that I will be complete, but my recollection is that among other things, we filed motions immediately attacking, of course, the Florida death penalty statutes.

There was motions filed for discovery and I am sure it was still the same rule as it is today, Florida Rule of Criminal Procedure 3.850 (sic) which is the discovery proceedings provided under Florida law in the State cases.

We made a few reciprocal demands for discovery so that the State would be required to provide to use, among other things, all witnesses who might have any

evidence relative either to the offense charged or with respect to any defense to the charge, that they would have to provide us with all scientific or medical testimony or expert witnesses that they might have.

We then engaged, and when I say "we," keeping in mind, there were co-counsels. Both the Public Defender was involved in the case and I know it was the law firm of Black and Denaro, or at least that is what it first was, and my recollection was that it was Jack Denaro who was representing a co-defendant.

We began to be engaged in the taking of depositions from the people who had been listed as State witnesses and other witnesses and initiated preparations for trial.

Q When you refer to the taking of depositions, you are referring to taking

depositions of people who had been listed by the State as witnesses at trial?

A That is essentially correct.

Q From what you have detailed, I understand that that was your preparation against the charges that had been made against Mr. Washington.

Was there any separate preparation at that time for the sentencing phase, for any possible sentencing phase in this proceedings at that point in time immediately after you were appointed to the Meli case?

A Only to the extent that obviously I considered as I was gathering the evidence and reports on the case and being aware at that time of what the various aggravating and mitigating circumstances were under the Florida statutes, I was, and in terms of thinking through how we might be at the end of that particular

proceeding if we got to it.

As far as actively searching for witnesses to address either a jury or a court and a Judge, I would say no, that we were not really addressing ourselves to that issue at that point in time.

Q And as I understand it, then, in deposing these State witnesses, you were looking for information in their testimony or in their depositions that would either relate to the aggravating or mitigating circumstances under the statute?

A I think--no, I am not going to say that.

I am saying if this is the stage that you are asking me question about, our goal at that point would have been twofold, and I don't think that either one of them was what you are suggesting.

One would have been to establish that

there was not proof beyond a reasonable doubt that we could create.

The second would have been to try to establish a bases to try to suppress evidence or to otherwise dilute the strength of the State's case in a trial posture.

This did not go on for that long a time, however. We were---well, that is my answer.

Q At this point in time in your preparation, what problems did you begin to anticipate in the representation of your client and the presentation of his case?

[Objection sustained]

BY MR. SHAPIRO:

Q Let me just ask some specific questions. Did you feel that you were limited in your ability to prepare in your time to prepare in this case? Were there any limitations placed on you?

A Well, I mean only insofar as the

Court giving dates and if you would help me out, with the Court's permission, I would like to know the date that Mr. Washington confessed to the second and third set of homicides.

Q My understanding was that was in mid November.

A That is my recollection, also, but I am just asking you for some instruction on the point. That is my recollection.

Q Did you hire an investigator at this point in time?

A No.

Q Did you ever hire an investigator in preparing for this case?

A No.

Q Did you file any motion with the Court for an investigator?

A No, not to my recollection.

Q How was your investigation conducted at this time?

A Well, it was conducted primarily through the State and by that I mean the State Attorney's office was having an almost open filed discovery in the Meli case and certainly when the Pridgen and the Birk's case came to pass, they were providing literally open file discovery and by that I mean police reports, I would not probably have gotten them.

They were providing them and I was getting a complete list of witnesses and I was getting copies of all reports up until the time--and this is why I asked you for the date on the confessions on the other two cases--up until I am going to say mid November, using your date, there were active preparations being made by way of subpoenas to summon witnesses to attorneys, officers, either the Public Defender's office or the State Attorney's office, so that those witnesses might

testify and give us a preview, so to speak, of what their testimony was going to be.

It was those kind of things, the normal kind of discovery process that was taking place in the Meli case and I will say that when Mr. Washington was arrested in November of 1976, on the second two cases that at that point there were events which occurred derived directly from thoses arrests which caused a cessation, if you will, for preparation on the Meli case in the trial posture.

Q You are referring to Mr. Washington making statements with respect to two other cases?

A Yes.

Q Do you recall what your reaction was when you learned that Mr. Washington had been indicted on two other cases?

A A fair amount of surprise among other

things and to be very candid with you and to completely answer the question fully as I think it should be in these type of proceedings, I had many, many hours of detailed conversation with David up until this point, up until the point of finding out and as I recall, I simply walked into the Justice Building and ran into, as I recall, Hank Adorno who is one of the prosecutors and perhaps one of the detectives, and was told that he had been arrested and that he had confessed and, in fact, they handed me an entire package of evidence on the case.

In any event, up until that point, I had been spending a great deal of time with David and vis-a-vis the kind of evidence that the State seemed able to produce in the Meli case, it was like night and day to sit down and talk to David.

David, so far as I was concerned, was intelligent, although perhaps not well educated, was certainly a person who expressed very capably human emotions, who expressed grave concerns about the welfare of his family, of his wife, of his child in a-l of my dealings with David, we had like an instant rapport one with the other, and I certainly felt very concerned for his well being and frankly found it difficult to believe that he could have committed the crime which he was then charged in the Meli case.

So, to answer your question, yes, I was shocked and surprised and I was particularly surprised in light of the fact that I had counseled David and that it was possible that he might be approached by detectives and someone attempting to question him and when I discovered that he had almost initiated the contact with

the detectives and had specifically on the record been advised that he had a right to have an attorney there and even mentioned the fact that the had a right to have me there by name, he waived those rights and it made me doubly surprised to find out about what I call the Pridgen and Birk case.

Q Do you recall talking with me about these matters in February of 1980?

A I recall that we conversed on the telephone. I have no notes of that conversation. You might.

Q Do you recall describing your feelings when you had learned about the other two capital murder indictments as a feeling of hopelessness in terms of coming up with any kind of defense in this case?

A Yes, I do recall saying that to you and once I saw the confessions that

David had given, I had a hopeless feeling. There is no question about that.

Q In your discussions with David, did you ever inquire of David whether he had a psychiatric history?

MR. SHAPIRO: May I strike that, your Honor?

THE COURT: You may.

BY MR. SHAPIRO:

Q Did you ever inquire of David as to whether he had ever been examined by a psychiatrist or a psychologist in the past?

A I honestly cannot recall. If I gave you a definitive answer of yet or no, it would be a lie.

Q Did you independently arrange for a psychiatrist or psychologist to examine David?

A That I know I did not.

Q Did you ever file a motion in the court to ask for funds for a psychiatrist

or psychologist to examine David Washington?

A If such a motion was filed, it would be in the record. My recollection is that there was not.

Q In your preparation for this case in your discussions with David, did you ask him whether he had any criminal record?

A Yes, and he was--yes, I discussed it with him. That is my answer, yes.

Q Did you ever have occasions to determine whether he had been previously incarcerated?

A I believe that was part and parcel of the same conversation.

Q Did you learn that he had been previously incarcerated?

A I believe so.

Q You never learned that from him?

A No, I didn't say that. I said I don't believe that he had been based upon

his conversations, I don't believe he had been incarcerated.

You mean sentenced, I presume?

Q Yes.

A Okay.

Q Did you make any other effort to determine whether he had ever been within the custody of the Department of Corrections or any other custodial facility in Florida?

A As part of the discovery material which I had, I had been given a copy of the FBI rap sheet by the prosecuting attorneys. I think it might be part of the record.

But in any event, my recollection is that even that revealed a lack of any convictions and certainly incarcerations. That is my recollection.

Q With respect to the sentencing in a capital proceeding, you mentioned that you

had reviewed the aggravating and mitigating circumstances.

What preparations had you undertaken to present evidence in support of mitigating circumstances or to rebutt any of the aggravating circumstances?

A That is a very difficult question because of how the whole guilty plea came about.

What the defendant did by entering a plea of guilty was essentially something that was contrary to what my advice was. It was, in my estimation, however, consistent with his conduct with the police officials to whom he gave confessions under the second two cases.

I had on occasions prior to December, prior to when he entered the guilty plea, spoken with either his wife or the woman he was living with, I believe it was his wife, and I believe his mother, and

although I can't be certain of the next statement, I am relatively certain that there had been some kind of written communication with either or both of them, the gist of which was that I wanted to speak with them in my office, to discuss with them--to just sit down and talk with them.

They never kept any appointments or I know I never met with them in my office. Now, beyond that, as far as actively going out and saying I am going to bring in former employers or anybody to testify on David's behalf, the direct answer to that is that I did not do any of those things.

So, that is the answer to the question.

I would say that the investigation, and I don't really think that is the term to use, but the work that was done to locate prospective witnesses to testify on his

behalf, I will call it minimal and that is using hindsight.

Q So, you never talked or attempted to locate witnesses to testify on David's behalf at the sentencing hearing?

A That is correct.

Q Did you ever have occasion to talk to David Washington about his childhood?

A Yes.

Q What information did you learn from him about his childhood?

A To ask me now what recollection I have of those conversations is really almost impossible for me to recall. We are talking about something that happened four and a half years ago at this point. I can't answer that.

I can recall basically that my recollection is that he did not complete high school, that he worked at a succession of

menial jobs, that he had trouble holding jobs, that he had been out of work for some several months, as I recall, prior to the arrest in the Meli case, that he had a wife, a child and that he was having difficulty supporting them.

But if you are asking me what history did I have as far as formative years and by that I mean the years from age one up to age fourteen or fifteen, I certainly don't have a wealth of knowledge to impart to you at this point and I can't say that I have any recollection of any of those conversations at this point.

Q And you do not recall going to talk to his relatives or if they came to meet you at your office or if you talked to his mother?

A I can say that I did not do that.

Q Or his wife?

A I can say that I did not do that.

Q Were you aware that David had a grandmother?

A No.

Q Were you aware or did you attempt to seek information that would establish that David Washington was abused as a child?

[Objection overruled].

BY MR. SHAPIRO:

Q Do you recall the question?

A I never received anything one way or the other.

Q You did not?

A I did not.

Q Did you inquire into the defendant's childhood to determine whether he had had an abused childhood?

A I really can't say. I think I can say that if he had described such a childhood, that I would at this time recall it.

front of a jury, that I was dead certain that the State or the prosecution would try, in aggravation or as aggravating circumstances, would attempt to utilize the evidence from the subsequent two indictments, the Pridgen and Birk case, as the record says, I had just received either that day or some short period of time prior to that day, a massive amount of discovery in the Birk and Pridgen cases and it was clear that I was not going to have time between that date and the arraignment date on November 26th or 27th and the trial date that had been set in the Meli case, to fully investigate the evidence in the Pridgen and Birk case.

By that, I mean to depose the witnesses, to fully sit through the various reports that I had in terms of being able to cross examine the witnesses in the Pridgen and Birk case to establish a lack

witness, your Honor?

THE COURT: You may.

MR. FOX: Your Honor, may I see the passage?

THE COURT: You may.

BY MR. SHAPIRO:

Q Do you recall at that point asking for a continuance in the Meli case because you had an inadequate time to prepare for the penalty phase because of the recent indictments that were handed down against your client?

A Well, yes, with the explanation simply that we were facing an upcoming trial date, according to that transcript, of about a week later on the Meli case and my concern at that point was that if, and that is the "if", if there had been a conviction at trial of the Meli case, in the 7600 case and we were then after a conviction to go into a penalty phase in

would have been kind of silly.

Q Can I read from this or ask you if you recall colloquy?

A Certainly or just show it to me.

[Objection]

MR. SHAPIRO: May I approach the witness?

THE COURT: You may.

THE WITNESS: Are you referring to the underlined portions?

BY MR. SHAPIRO:

Q I direct your attention to the page that you are presently looking at and the next page, specifically the underlined portions in that colloquy between you and Judge Fuller.

A Oh, yes, okay, the whole thing in context I remember completely.

Q Does that refresh your recollection?

A Yes.

MR. SHAPIRO: May I approach the

back.

BY MR. SHAPIRO:

Q I will repeat it.

Do you recall discussing after the two subsequent indictments had been handed down, the second and third indictment had been down against David Washington, do you recall requesting additional time for the penalty phase in the Meli case?

A Not specifically, but I wouldn't doubt that it happened. It doesn't sound really quite right to me. I would almost be certain that I did not couch anything on those particular terms because the guilty plea, so far as I recall, it was not entered until December.

So, to have asked for more time in November for a sentencing phase to which there had been no adjudication of guilt

Q --of any activities in the community?

A [No response.]

Q With respect to the proceedings on 11/22/76 and 11/24/76, I believe there was some discussions regarding a continuance in the Meli case.

Do you recall those discussions?

A No-- Yes-- I mean, I recall that, but I don't recall the dates as being actually the dates that it occurred. I am certain there was some discussion at that point in light of the developments in the case.

Q Do you recall at that point requesting additional time in the Meli case because of the two indictments that had been--

[Objection overruled].

THE WITNESS: Please repeat the question or have the court reporter read it

But I don't recall it. That is my answer.

Q I understand that, but do you recall inquiring of him whether he had an abused childhood?

A No, I am saying that I cannot recall inquiring of him.

Q Did you have any information about any activities of David Washington in his community around the time of the crimes?

A No.

Q Did you make any investigation to find out what kind of activities David Washington had been participating in around the time of his crimes?

A Yes.

Q What kind of investigation did you undertake?

A Just conversations with David.

Q Conversations with David, but no independent investigation--

A No.

of credibility in that case or, alternatively, to adequately even research the issues in that case to see what kind of evidence could be used as aggravating circumstances in a case which, in a point of time, occurred after the two cases which, in effect, were going to follow the last case for trial. I don't know

Q Were there any other concerns at that time about your preparation for a possible penalty phase in the case?

A I am sure, Mr. Shapiro, my concerns were not too different than what you are concerned with here today. Yes, I was very concerned about it.

Q At the guilty proceedings on December 1st, what was the reason for not asking for a continuance at the guilty proceedings when you indicated a short time before your had not had an adequate

time to prepare?

A Keeping in mind there is a certain subjectiveness to all of this being it is four and a half years later, but based upon the nature of the charges that I was being requested to defend and which I was willing to defend, the clear probability from a legal standpoint, just from a detached view of the distance possibility of the imposition of at least one death penalty in these various cases, it was not, in my opinion, to Mr. Washington's best interest to go to trial.

Mr. Washington confessed without having me there. Mr. Washington also essentially chose to enter a guilty plea against my better judgment.

Against my better judgment, he chose to waive a sentencing jury and that that point I can honestly say that I don't know

Mr. Washington confessed without having me there. Mr. Washington also essentially chose to enter a guilty plea against my better judgment.

Against my better judgment, he chose to waive a sentencing jury and that that point I can honestly say that I don't know that I felt that there was anything which I could do which was going to save David Washington from his fate.

Q So, that essentially was your feeling?

A I mean I had that feeling, I don't understand what you mean.

Q That was your reason for not moving for a continuance?

A As far as the time between the entry of the plea and the first of December and the sentencing hearing a week later or six days later, whatever it was, I really cannot say that the actual thought of going in and affirmatively and aggressively moving for a continuance really occurred to me.

that I felt that there was anything which I could do which was going to save David Washington from his fate.

Q So, that essentially was your feeling?

A I mean I had that feeling, I don't understand what you mean.

Q That was your reason for not moving for a continuance?

A As far as the time between the entry of the plea and the first December and the sentencing hearing a week later or six days later, whatever it was, I really cannot say that the actual thought of going in and affirmatively and aggressively moving for a continuance really occurred to me.

Q At that point in time, what was your strategy for the sentencing phase?

A Among other things and certainly one

of the few things which I took into account as an attorney , which I can't I discussed with David, but I took into account simply from the familiarity with the trial Judge, Richard Fuller, was that he, being the trial Judge, respected any individual who had been accused of a crime and who, in fact, was guilty of a crime and who came before him and admitted his guilt.

To myself, I certainly thought if David had any chance at all, and I am really getting subjective, in front of this partiucular Judge, on this particular facts for these particular kind of crimes, that the one shot he perhaps had was the fact that he genuinely was coming before the Court and admitting his guilt, unlike some defendants who come in and plead guilty to avoid a harsher punishment.

I really felt that Judge Fuller knew this was not such a ploy by Washington and based upon that and my subjective analysis of Judge Fuller at that time at that state of his career as a Judge, I felt that perhaps the strongest point that David had to save himself from the electric chair, and I can't say that this was fully discussed between David and I, but the thought went through my mind, keeping in mind the mitigating factors which the statute set forth at that time and some had already been put on the record as far as the testimony on December 1st is concerned from David himself, but I went through all of the aggravating and mitigating circumstances which the statute described and I was familiar with all the cases to that point that had been ruled upon the statute and various aspects of it, and I felt that one of the mitigating circumstances ought to be the fact that he was pleading guilty.

I really could find very little to address myself to in terms of a relevant, cogent presentation of mitigating circumstances as outlined by the statute itself and certainly insofar as aggravating circumstances are concerned, I did not feel exactly like I had sufficient ammunition to persuade anybody that the State was not going to succeed in showing at least that they outweighed the mitigating circumstances.

I felt it was more of a legal argument at that point as far the aggravating circumstances were concerned.

* * *

Q What were your reasons for not requesting a pre-sentence investigation in this case?

A We were dealing with convictions at that point--

[Objection overruled].

A Yes, sir, under State law with convictions in three separate cases for the

crime of first degree murder, the sentencing Judge with regard to the charges and convictions for a murder in the first degree, had a choice only between life sentences with minimum mandatory terms without parole of twenty-five years or death in each of the cases.

Now, my understanding of State law at the time, and correct me if I am wrong, was that it was discretionary with the trial Court whether to give it or not to give it.

I don't recall specifically asking for it. I cannot say now, with hindsight that that was a matter of trial strategy or perhaps lack of forethought at the time and I can only say that I personally didn't believe that there was going to be anything in a PSI which was going to be helpful to Mr. Washington, vis-a-vis a sentencing for the particular crimes that were charged.

I was somewhat concerned that it might establish facts more detrimental to my

client than were already on the record if that is possible.

Q But you are also aware that a pre-sentencing investigation would involve an inquiry into the defendant's background, childhood, social history.

A Of course.

Q And it would present this information to the Judge?

A Absolutely, but I can't say that I thought about it in those terms at the time.

I mean, I am aware of all of those things, obviously.

Q You mentioned Judge Fuller would be more responsive to someone who pled guilty to the crimes.

A This is a very hard question to answer. But I think, as a trial attorney, I think that certainly one of the things which a trial attorney is responsible for is knowing, at least to some extent, the quirks and differences of opinion, political philosophy,

philisophoical approach to the law which varying judges demonstrate in their day-to-day activities.

On particular facet of Judge Fuller's personality, if you will, as a Judge, was simply that it was my personal feeling that if a person were guilty and I preface it with that, that if a person were guilty and came before the Court and pled guilty as opposed to going to court and hoping to "beat the case" and then losing, that that person was going to get a lighter sentence.

In other words, if there was a conviction obtained in either of the circumstances, that the person who pled guilty was more likely to get the lighter sentence. I am not saying that is right, but that was my personal opinion of the Judge at that time.

Q Do you think that Judge Fuller would have been concerned about a defendant's remorse?

A Oh, yes, I think that was all part and

parcel of David's attitude in court and also to me out of court. That is why I had the strong feeling that this was the most important thing he had going for him.

Q Did you ever think of members of David's family coming to the hearing and testifying about remorse that David Washington felt?

A My recollection was that there was some communication of some conversations at this point.

Now, I can't swear to this. I really don't think David--I don't know.

My recollection is that no one was there from his family and my recollection of conversations with David was that he did not want anybody there.

I can't swear to that, but that is my recollection.

Q Well, even if David had suggested to you that he didn't want anyone there, in order to more properly present any case of remorse to Judge Fuller, did you ever consider

-- Strike that.

Even if David didn't want anyone there fore purposes of a sentencing, did you even consider that it would have been more important for Judge Fuller to have heard about David's remorse from members of his family or other people that had contact with him subsequent to the commission of the crime?

A No, I never considered it that way.

Q Did you ever consider having a minister or other clergyman visit David in the jail to discuss any possible remorse and to testify at the sentencing hearing?

A No.

* * *

BY MR. SHAPIRO:

Q Now, do you recall filing a sentencing memorandum before Judge Fuller prior to the December 6th sentencing

hearing?

A My recollection is that there was.

Q May I show you a memorandum of pre-sentencing and ask you if you filed this memorandum before Judge Fuller prior to the sentencing hearing?

MR. SHAPIRO: May I approach the witness, your Honor?

THE COURT: You may.

THE WITNESS: This is certainly a pleading which I filed, yes, or prepared and I presume filed.

MR. SHAPIRO: Your Honor, this is Exhibit 1 to the petition that was filed in the State Court attached to the motion for post conviction relief.

BY MR. SHAPIRO:

Q Now, referring to that memorandum, have you had a chance to review that memorandum?

A Briefly, yes.

Q In that memorandum, as you will notice, there is no argument whatsoever with respect to the applicability of aggravating circumstances (5)(e) Felony was committed for the purpose of avoiding or preventing an unlawful arrest or effecting an escape from custody.

Do you recall why you did not present any argument as to the applicability or inapplicability as to that aggravating circumstance in this case?

A I don't believe that is the only one that I didn't address. Maybe it is.

Q But it is the only one that you did not concede or did not address.

A I believe that is correct.

Q Do you recall why?

A Not now. I know what I did on the brief on appeal, but I don't know why. I can't say now why I did it at the time.

Q Now, with respect to the mitigating circumstances, I believe in the memorandum you conceded that there was no evidence that the capacity of the defendant to appreciate the criminality of his conduct or confirm his conduct to the requirement of law was substantially impaired.

That is aggravating circumstance (6) (f).

A You mean mitigating?

Q Mitigating, pardon me. I believe you conceded the inapplicability.

A I don't know if I conceded then. I don't believe I raised it either. So, I guess by innuendo you can say that.

Q I refer you to the first page of the memorandum.

You do mention that you concede that is not applicable in the present case.

A Yes, that is correct.

Q Now, without obtaining a psychiatric examination or psychological evaluation of Mr. Washington, what was your reason for conceding the inapplicability of that mitigating circumstance [6B]?

A I cannot say today whether I ever saw the Jackson Memorial report of Sanford Jacobson. I have seen it since.

I can't say that I saw it or did not see at that time.

So, in direct answer to your question, I never saw any medical reports that I can recall as of today, although it is possible that I did.

The only thing that I can say in response to that question is very simply is that point, from six or seven years as a trial lawyer in criminal cases exclusively, both as a prosecutor and defense attorney and based upon extensive

communications with Mr. Washington himself, I just did not see it.

To me, the man was sane.

Q All right, sane.

And is it your understanding that mitigating circumstances (6) (f), that the scope of that is co-extensive with the insanity test in Florida?

A No, I don't think that is that simple, but I would say, to me, that they are not necessarily mutually consistent, but certainly one could be said to be part of the other.

But provision (6) (f) is even broader. I suppose I could go further to say that the act was produced by a man that was so over wrought or I don't know what word you would want to use, that there was some hint of insanity, that that was not an excuse for the crime, but rather, I guess, you could call it a mitigating factor.

But as far as David was concerned, he had expressed even the reason really for the commission of the crime which had been committed, as far as the Meli case was concerned and the Birk case and Pridgen case, I can't say that is necessarily true, but he indicated to me a clear understanding of why he had a committed a crime.

He had already said that in court in the sentencing colloquy between himself and Judge Fuller on the first hearing in September and seemed to indicate that he knew what he was doing and it was pecuniary gain.

Q Mitigating circumstance (6) (f) also refers to the inability for someone to conform their conduct to requirements of law, the capacity of the defendant to appreciate the criminality of his conduct

or to conform to his conduct to requirements of law, that it was not impaired.

A I certainly thought that was not applicable.

Q You thought that was not applicable without obtaining any psychiatric or psychological evaluation of the defendant?

A That is correct.

Q But as I recall your memorandum regarding (6) (b), the Capital Felony was committed while the defendant was under the influence of extreme mental and/or emotional disturbance.

A I did not equate them as being the same. I see where you are going. Maybe I should have because he said he had been out of work for six months and he had impressed me as being sincerely concerned for the welfare of his wife and child. I believe his words were that he could not

even buy pampers for his kid and that was the starting point of him being engaged in these series of acts.

Q But my question is, why once having chosen to argue that particular mitigating circumstance, why did you not seek a psychiatric or psychological examination of David to support your presentation of that circumstance?

A I did not equate what I was attempting to show Judge Fuller with that particular mitigating circumstance with any kind of testimony which a psychiatrist might offer.

It was unrebutted on the record as to the reason why he had become engaged in this series of criminal acts and his unrebutted testimony was that he had been under the emotional distress as far as what I told you about his inability to

support his family or himself.

To me, it was two-edge sword I guess you could say because the farther we went with it, the more obvious it became what the actual purpose of the various crimes, were, to get money.

Q So, it was in your judgment at that point that a psychiatric and psychological examination of the defendant would in no way help you to present the statutory or mitigating circumstance?

A That was my judgment at the time.

Q With respect to the non-statutory circumstances that may have provided Judge Fuller with a reason in the defendant's history or background for his conduct, did you also conclude that a psychiatric or psychological evaluation would not be helpful at all in the presentation of any non-statutory mitigating factors?

A Yes, my answer was the same to that throughout, that it would not be of help. Right or wrong, that was my judgment at the time.

Q What was the reason for not conducting any investigation of David Washington's background, character and circumstances surrounding the time of the offense?

A I think the easiest way to answer that I suppose is to say that there had not been much cooperation at that point and secondly, as I keep saying, having talked with David for lengthy periods of time, I was not of the opinion that we were going to glean something from his background to sway the Court not to impose the death penalty.

Q Then, my question is: You do not think it would have been a benefit through a presentation of the circumstances of

David's life, that the crime would not be an abnormal, obvert action of David Washington?

You didn't see that?

MR. FOX: Your Honor, I object. Counsel is putting words into the witness' mouth.

THE WITNESS: I never thought of it in those terms. I do not now and never did at that time.

BY MR. SHAPIRO:

Q So, your choice as to which the statutory mitigating circumstances and which non-statutory mitigating circumstances to present was based on your judgment of the situation without any investigation and without any psychological or psychiatric examination of the defendant?

A Well, I don't like the way the question was worded because it is trapping me.

The first way I am going to answer the question is to say that I would like to think at the time that I thought of every possible mitigating circumstance that I could possibly have thought of and tried to present to Judge Fuller at that time.

But in direct answer to your actual question was that I did not think at the time to go ahead and utilize psychiatric or psychological experts to somehow demonstrate the overriding the nature of the mitigating circumstances, I did not think of that.

MR. SHAPIRO: May I have one more moment, your Honor?

THE COURT: You may.

MR. SHAPIRO: I have no further questions.

THE COURT: All right. Cross examination.

CROSS EXAMINATION

BY MR. FOX:

Q Mr. Tunkey, you mentioned that you had been in practice seven years at the time of this case; is that correct?

A Six and a half years, I think.

Q When were you admitted to the Bar?

A In May of 1970?

Q What was your prior experience prior to this case?

A I was Assistant State Attorney in Richard Gerstein's office from May of 1970 until May of 1973.

From May of 1974, until my appointment to represent Mr. Washington, I was engaged in private practice and was almost exclusively concentrating my practice on trial and appeals in criminal cases.

Q Have you been appointed in other cases to represent defendants?

MR. SHAPIRO: Your Honor, I object to this line of questioning. I think the issue before the Court is the narrow one of Mr. Tunkey's performance in this case and not one of the general competency of Mr. Tunkey of which we do not question.

MR. FOX: Your Honor, I think--

THE COURT: Overruled.

THE WITNESS: Yes, I had.

BY MR. FOX:

Q Approximately how many cases before this case?

A Between cases in which I myself had been appointed or in which other members of the firm had been appointed, but I was the attorney with either trial or preparation responsibility, I am certain that it was something in excess of a 100 cases at that point as a Special Assistant Public Defender.

Q How many criminal cases had been

handled up to that point as both a prosecutor and defense counsel?

A I couldn't even begin to count, something certainly beyond 500 or 600, perhaps over a 1,000.

Q Mr. Tunkey, your testimony here, is that exhaustive as to your investigative preparation of the Meli case?

A No, not at all.

MR. FOX: Your Honor, for your information and for the witness' information, the Meli confession was on 10/1/76. The Pridgen confession was 11/5/76, and the Birk confession was also on 11/5/76.

BY MR. FOX:

Q You testified that the State, during your representation, was providing open file discovery.

A Well, so far as I knew it, yes, that's how I would term it.

[Objection overruled]

BY MR. FOX:

Q Prior to the defendant's plea of guilty in these cases, Mr. Tunkey, were prepared to go forward with the case?

A What do you mean by "go forward"? Do you mean the trial?

Q Yes.

A On the Meli case, I would say we were getting close to being ready to go trial, yes.

Q How would you characterize the State's case in the Meli case, in your experience?

A Well, assuming the admissibility of the confession, I would say that the evidence was close to overwhelming. That was a major assumption, I think, on that particular confession.

Q All right.

How about with regard to the Pridgen

case and the Birk case?

A Well, my memory is kind of dim at this point as to what kind of corroborative evidence there was of a direct nature which would point a finger at David Washington in either one of those cases.

But again, assuming the admissibility of those two confessions, there was certainly ample evidence to demonstrate that the confessions were not given by a person unfamiliar with the facts of the case.

Q Are these confessions the events which you referred to that cause you a cessation of preparation?

A A cessation and end, yes, those are the events.

Q And the plea of guilty, that was over your objection?

A It was against my advice. I just don't recommend a guilty plea in any case

on which I am not really getting anything.

Q You testified that you were not aware of the defendant's criminal background.

A Yet, I am aware of it. I was aware of it at that time. I cannot tell you today what it was or what it is.

Q You cannot recall the specifics of that?

A No.

Q You would not be aware one way or the other whether or not he had a prior felony conviction or not?

A I think he did, but I don't think the rap sheet could prove it. I think that's basically what it came down to.

Q Now, counsel has mentioned that you did not investigate former employers and witnesses and so forth.

Did the defendant mention anybody

as witnesses on his behalf with regard to the sentencing proceeding?

A No, not in those terms, but I mean we had discussed where he had worked and those kind of things and primarily the fact that he had been out of work for three or four months before the Meli case or the Pridgen case occurred.

So, the direct answer to the question is no, not in those terms, although we skirted around the issue, I guess you could say.

Q Did the defendant bring up any evidence that he had been abused or make any comment that the had been abused as a child?

A Not that I recall, not that I recall.

Q Did the defendant discuss with you any activities prior to the murders?

A Oh, certainly.

Q Any sort of criminal background prior to the murders?

A Yes, and that was even part of one of the confessions, as I recall it.

Q So, you are aware that the defendant had a prior criminal background from the defendant's own words; is that correct?

A Yes, it was part of the confession in the Birk case essentially.

Q With regard to the defendant's attitude towards the trial Court as being one of remorse, you testified that the defendant did demonstrate that remorse; is that correct?

A Yes.

Q Isn't it true, Mr. Tunkey, that the defendant himself would be the best evidence of this own remorse?

[Objection sustained]

BY MR. FOX:

Q Mr. Tunkey, why didn't you produce anyone from the defendant's family at the

time of sentencing to demonstrate his remorse?

A First of all, I had trouble getting in touch with them, but assuming I could have gotten in touch with them, but the remorse that was shown, I assume it would have been shown in jail since he was not any place but jail from the day of his arrest until the sentencing on the 6th of December.

I also thought it would have been superfluous because the remorse that David exhibited to me in court was of sufficient quality and quantity that it was obvious, to me anyway, and I thought to the trial Judge, that it was completely sincere, that it was not something that was phoned up, if you will, to try to get a life sentence. In a rather ingenuous point at a hearing, I don't know which one, David expressed the thought that it would probably be better to be sentenced to death than to rot in jail for the rest of his life.

Now, regardless of whether that was a request for a death sentence which I don't think it was, but regardless of what connotation you give to that statement, the statement itself I thought showed the truthfulness, ingenuousness of the person, that he was really sincerely up there trying to explain to the Court that he was genuinely sorry for what he had done.

There were times that he, even through tears which is not on the record, exhibited his true remorse for what had occurred and I would certainly say that he was honestly remorseful for everything that he was charged with.

Q Would those witnesses have added or detracted from the presentation?

A I can't answer that question. There is no way of knowing that.

Q Mr. Tunkey, late in your direct examination, you indicated that psychiatric examinations would be two-edge sword to your presen-

tation.

Could you explain that analysis to the Court?

A Yes. Very simply, that if they had been presented to the trial Judge, they could have just as easily established, it seems to me, the fact that the defendant was apparently engaged in these type of activities for really no other reason than the pressing economic need of his family. I don't believe that offers a legal justification for the acts committed.

Q Mr. Tunkey, I would like to reiterate one point here.

You testified that there was nothing from the defendant's prior record which you considered would have been of substantial benefit to the defendant in swaying the Court from aggravating circumstances in this case.

A That's correct.

* * * *

[CROSS EXAMINATION]

BY MR. SHAPIRO:

Q Mr. Tunkey, you have had an opportunity to review the reports of Dr. Lane and Dr. Barnard; is that correct?

A Yes.

Q And you testified that those reports are consistent with your professional judgment?

A Yes.

Q Do you also feel that they present information that would have been admissible as a non-statutory mitigating factor at a sentencing hearing in this case?

A Oh, certainly, I think it would have been admitted into evidence. Yes, I believe that.

Q In essence, you said that the reports would be corroborative of your presentation to the sentencing Judge; is that correct?

A Yes, in most respects, yes.

Q Isn't it true that the reports also linked the events in the defendant's child-

hood with his behavior at the time of the crimes in a manner that was not presented to the sentencing Judge?

[Objection Sustained]

[REDIRECT EXAMINATION]

BY MR. FOX:

Q Mr. Tunkey, I refer you to Page 226 of the record at the conclusion of the State's case at the sentencing hearing and I would like you to examine that and see if you recall that passage. It is at the bottom of that page and into the next page.

I believe the record reflects a recess and a conference with the defendant.

A Yes.

Q Do you recall whether or not it was discussed whether or not the defendant would testify or whether or not there was any evidence or witnesses that the defendant wanted you to put on, anything of that nature or that sort?

MR. SHAPIRO: Your Honor, I believe

this is out of the scope of my cross examination or beyond the scope of my direct examination or beyond the scope of the Attorney General's direct when he made this witness his witness. I think it is an all new area of inquiry.

THE COURT: Well, I think it is, but I am going to permit it and you can come back on it because of the nature of the proceedings.

BY MR. FOX:

Q Do you recall if there was any discussion with the defendant at that point as to him testifying or not testifying and/or any evidence he desired to put on?

A The primary discussion which we were having is whether he was going to offer any further testimony from that which was offered on December 1st.

Q The plea colloquy?

A Yes, and anything further on that.

Q Anything further or was the decision made

to offer anything further?

A Yes.

Q And what was that decision?

A Not to.

RE CROSS EXAMINATION

BY MR. SHAPIRO:

Q The decision that you just referred to was a decision by Mr. Washington that he personally did not want to offer any further information or testimony beyond what he testified at the guilty proceedings?

A That is exactly what I meant.

Q He did not discuss with you whether he did or did not want to discuss any additional evidence or testimony of anybody else at that time?

A I don't believe he requested testimony of anybody else.

Q When you had this discussion with him, it related not solely to him, but--

A It related to him and, of course, if he testified that he could then be cross

examine on the rap sheet. I was afraid that the cross examination would turn into a lengthy one by the State Attorney.

Q What I am trying to understand, did Mr. Washington tell you that he did not want any additional evidence or testimony at his sentencing hearing or did he merely tell you that he did not wish to testify personally beyond what he said at the guilty proceedings?

A That was it, if he did not wish to offer any additional testimony and rely on the prior testimony and avoid cross examination. That was our particular point of discussion at that recess at that point in time when the Judge gave us that time.

[Thereupon the Petitioner rested; there was a brief recess and then the Court deferred ruling upon the

Respondents' Motion for a directed
verdict/dismissal].

Thereupon:

RICHARD FULLER

was called as a witness by the respondents
and, having been first duly sworn, was
examined and testified as follows:

THE COURT: For the record, state your
full name and occupation.

THE WITNESS: Richard S. Fuller, Judge,
retired.

THE COURT: You may proceed.

MR. FOX: Judge, at this point, we
would ask the Court to take judicial
notice of the matters that have been filed
with the respondent's response in this
case, that is the record on appeal, on
direct appeal and other matters, noting
particularly the deendant's Rule 3.850
motion with exhibits attached as filed
in the State Court.

THE COURT: No objection to that?

MR. SHAPIRO: No objection except I haven't received a copy of the response. I was wondering if I could be served with a copy of it.

Thank you.

THE COURT: I will take the notice requested.

MR. FOX: Your Honor, I would like the record to reflect that these matters were provided at the original hearing in this case which I believe was Tuesday and I did provide Mr. Shapiro with a copy of our response as filed including the cover letter of the Court.

* * *

DIRECT EXAMINATION

BY MR. FOX:

Q Judge Fuller, you have stated you are a Judge. Is that with the State

Court?

A Yes, sir.

Q The Eleventh Judicial Circuit here in Miami?

A That is true.

Q Were you so occupied in October of 1976?

A Yes, sir.

Q How long had you been a Judge at that time?

A I came on the Bench in the summer of 1974, and I believe I was transferred to the Criminal Division in December of '75.

Q So, you had been on the Criminal Bench approximately a year at that time in October of '76.

A That is correct.

Q When were you admitted to the Bar?

A 1955.

Q Have you received any training as a

trial Court Judge while you were on the Bench?

A Well, like all judges, we attend the International College of the State Judiciary at the University of Nevada in Reno.

We have a new judges' college which is for all new judges at the University of Florida and also some nineteen or twenty years of practice on the other side of the Bench.

Q Your practice was as a trial lawyer?

A That is true.

Q How many criminal cases have you handled in your career up until October 1976?

A I really couldn't give you an exact number. I inherited a division that was relatively heavy in pending cases that had been handled by Judge Sidney Weaver.

I can only tell you that during the years from '74 to '76 or '77, we were assigned in the neighborhood of 1,200 felony cases per year and my responsibility was to handle the disposition of those cases and I would say that we averaged about seventy-five jury trials per year for the first two or three years.

It dropped some after that when I decided it wasn't worth working from 7:00 in the morning until 9:00 o'clock at night.

Q During the course of your tenure on the Bench, Judge, have you ever suffered any reversals?

A Who hasn't? Yes, I think all of us have been educated by the Appellate Courts at some time or another.

Q Have you received any reversals with regard to penalties?

A No, sir. The only problem I ever had with penalties is that I have made six periods of incarceration as conditions of probation and the Florida Supreme Court said that shouldn't done.

MR. SHAPIRO: Your Honor, I object to this inquiry. I don't primarily see the relevancy.

THE COURT: I think we are concerned with what happened at the sentencing.

MR. FOX: Judge, I would submit that all of the experience of the parties involved, what they perceived and their experience as they applied it to this case is extremely relevant.

THE COURT: We have already had some of it.

Have you finished that or how far would you like to go?

Maybe Mr. Shapiro would like to stipulate to his qualifications and

experience.

MR. SHAPIRO: I have no problem with stipulating to his qualifications as a Judge who presided over criminal cases in the State and his experience, as such.

THE COURT: Is there anything more than that that you would like?

MR. FOX: Then, at this point, the respondent would offer Judge Fuller as an expert witness with regard to his experience on the Bench.

THE COURT: Mr. Shapiro?

MR. SHAPIRO: Your Honor, it depends on what he is questioning him about. I concede that he is an expert in some areas, but I am not willing to stipulate to his general qualifications of an expert in criminal proceedings.

THE COURT: It seems to me it would be relevant to know what he did and why he did it in this particular sentencing and

if these matters that Mr. Shapiro has now developed has some effect--

MR. FOX: Yes, I understand and that is precisely what the respondent is trying to pursue.

THE COURT: Let's go on.

MR. SHAPIRO: For the record, we will now withdraw our objection.

BY MR. FOX:

Q Do you recall the case of State v. Washington for three counts of first degree murder and one count of escape, I think it was?

A Yes, sir.

Q Do you recall on October 6, 1976, you appointed William Tunkey to represent the defendant?

A I think I appointed Mr. Tunkey in one of the cases and then followed up with another appointment in cases where later indictments came in.

Q Yes, Judge, and October 6th was the Meli killing?

A Yes.

Q Did you have any prior knowledge of Mr. Tunkey prior to your appointment of Mr. Tunkey in this case.

A Of course.

Q Could you explain to us what that was?

A Well, I had been asked by Judge Crawford to transfer out of the Civil Division to Criminal.

I recognized upon my transfer that it would be incumbent upon me to learn as rapidly as possible the local criminal bar because it would be my responsibility in some instances to make appointments of counsel where there was a conflict within the Public Defender's office.

I inquired of other judges who had at that time been involved in the

criminal system and Mr. Tunkey had appeared in front of me on a number of cases beforehand and I made appointments of counsel, to be perfectly candid with you, out of the better segment of the trial bar because I was a fellow that was called upon to impose sentences and that any judge who did less than the best in his appointment for private counsel, was making a big mistake.

In this case, I appointed who I felt at that time and still feel are the better part of the criminal bar, Bill Tunkey and fellow named Jack Denaro and a fellow named Roy Black and Mr. Link was, in my opinion, competent to represent the person who had the Public Defender.

That was the basis upon which he was appointed.

Q Did you have an opinion as to Mr. Tunkey's reputation then"

A Bill Tunkey at that time and today has a reputation that I thought was impeccable. He worked hard. He did not ex parte judges, tried his cases as they should be tried and unlike other lawyers, did not argue unless he thought something was wrong or amiss. He was there when he was supposed to be and I wish I could have used him more. But obviously it would not have been proper.

Q Did you have chance to examine the record to refresh your recollection of the present case?

A I have and I hope I have refreshed it sufficiently.

Q Are you familiar with the report of October 6, 1978, of Dr. Jacobson of the Jackson Memorial Hospital Forensic Research Unit?

A I am familiar with the report that was rendered as a result of Judge Klein

in the Magistrate Court and it was given to Judge Tanksley, I believe.

However, I do believe your year is wrong. I believe it was '76.

Q Yes, sir, I am sorry.

A I am and was.

Q You were familiar with it at the time of this case?

A Yes, sir.

Q Prior to December 1, 1976, had this case proceeded in an orderly and prompt fashion?

A I would think so.

Q Is there any reason to question Mr. Tunkey's handling of the case prior to December 1, 1976?

A None whatsoever.

Q I direct your attention then to the plea colloquy on December 1, 1976.

Have you had an opportunity to review that plea colloquy?

A Yes, I have.

THE COURT: It should be clear that we are not inquiring into the propriety of Judge Fuller's actions at that time.

MR. FOX: Yes, I understand.

BY MR. FOX:

Q With regard to the plea colloquy, Judge Fuller, do you recall having reviewed that plea colloquy as to whose idea it was to plead guilty?

A I reviewed the entire matter that was given to me to review and yes, I do.

Q Do you have an opinion as to whose idea it was to plead guilty?

A Yes, there was a lot of conversation at the first part of the plea between Mr. Tunkey and the Court and later with Mr. Washington and the Court as to who wanted to do what.

I was impressed with the feeling

that Mr. Washington wanted to get this off his chest, that he was very concerned about his conduct and that he had gone outside of his lawyer's instructions to interview with police officers and give them statements that were obviously inculpatory and that his pleas were made for whatever purpose he deemed them to be made and not necessarily with Mr. Tunkey's approval or even recommendation.

As a result of that, and it doesn't happen to a trial Judge very often, I was very concerned that Mr. Washington understood where he was and where I was going and the possible consequences of a plea and hence, my conversation with him was probably somewhat longer than what they might normally be.

Q Had you informed --

MR. SHAPIRO: I object to this line of

inquiry. It is irrelevant to the pleadings before this Court which is the sentencing and not the presentence colloquy.

THE COURT: This is preliminary but let us move on to the sentencing.

MR. FOX: Your Honor, if I may, there is one question that I would like to ask and this is my witness on direct examination to the defendant's claim in this case particularly one that was directed particularly to Judge Fuller.

BY MR. FOX:

Q I would like to ask you at the point of the plea on December 1, 1976, had you formed any opinion as to the appropriate penalty in this case?

A Absolutely not.

Q Judge, were you presentenced with and were you familiar with the demeanor of the defendant during the plea colloquy and the sentencing proceeding?

A Yes, sir, I had been involved in a number of capital cases previously. A trial Judge does not look in these things in an abstract type of fashion.

I may have been called upon to impose the most seriously penalty in the world and I didn't look at it in a light vein at all. I was very concerned that this man knew what he was doing.

I was concerned about his background, the things he told me about his employment and his family and it was terrible important because I had to base a decision as to whether or not he knew the consequences of his plea.

I didn't look at this in any other vein except that David Washington knew what was going on. He had been one of the most courteous people I had ever had in my courtroom and I didn't want him to be lulled into some sort of a sense of

security and that is why I told him I might give him a death penalty as I had said to others that I had handled up to that date.

Q You were familiar with the background and problems of the defendant?

A I was familiar with those matters that Mr. Washington wanted to tell me about at the time of this plea and those matters that were contained in those statements.

I was interested in them because I had to form an opinion as to his voluntariness and knowingly giving the plea.

Q Judge, the sentencing proceeding in this case was set for December 6, 1976, which is about five days later.

Is there anything unusual about that sort of schedule?

A It is a little longer than what has been my decision sitting in court normally.

When there is a finding of guilt, we normally go right into a sentencing unless it is something like 7:00 or 8:00 o'clock at night. Then we would go to next day.

So, it was unusual in that there was more time given between the time of the plea and the time of the sentencing hearing.

Q Now, with respect to the sentencing proceeding itself, do you recall anything particularly with regard to the manner and conduct of Mr. Tunkey during the proceeding?

A Yes, sir.

Q Could you tell us what that was?

A Yes, as I indicated, it is an unusual circumstances when somebody gets up and pleads guilty to three first degree murders and waives a hearing or recommendation

by a jury. That had never happened to be before and I don't know of any judge who had ever had that experience.

I was truly in the position of having the power of life or death over somebody without a jury being involved and it was and it is a very sobering experience. I can assure you of that.

The case was well tried. Mr. Washington was his typical self during the course of it. I was left with the impression that he wanted to get this behind him.

Q Do you recall Mr. Tunkey's presentation and arguments to you in the case?

A I don't recall them word for word, but I know I was certainly satisfied that he was doing his best in his very friendly, amicable fashion to have me give this young man life rather than death.

Q Did you consider Mr. Tunkey's

presentation effective?

A Yes, I did.

Q In your sentencing order, Judge, you found a vast array of aggravating circumstances in this case.

Do you recall those aggravating circumstances?

A I recall that there were a lot of them. I recall that they were well planned, well thought out violent homicides and even with Bill Tunkey's pleasant smile and graciousness to the Court and all other things, it wasn't enough to take away from the seriousness of the crime.

So, I could tell you yes, the number of robberies involved, a question of burglarizing the house, breaking and entering and a various number of aggravating circumstances.

Q Would you characterize the circumstances as moderate, light, overwhelming?

[Objection overruled]

THE WITNESS: I am sorry. I forgot the question.

BY MR. FOX:

Q How would characterize the array of aggravating circumstances in this case, in your experience?

A They were vast. It has been my experience in handling the Opa Locka murders and others in this community and I would say these murders were as bad as any I have had, no lack of concern for people and their dignity. The manner in which these people were shot, stabbed or treated, it was overwhelmingly tragic.

Q In your sentencing order, Judge, you find non-statutory mitigation, but it states that there was insufficient

mitigation.

Can you explain that?

A As I remember the facts, Mr. Fox, of the enumerated group of mitigating circumstances, there were none and maybe my English wasn't appropriate because I wrote my own orders and I didn't ask the State Attorney to prepare these, I had considered his age, his family, the things he told me, his candor with the Court and I considered the authority, that his admission had been given and to me anybody that would get up in public and say they have done something wrong, gets a lot of stripes on his side.

I think that is the first step and I was particularly pleased that he took this position, although not enumerated by the Court, but it didn't add enough weight from the position where I thought I should be,

to impose the death penalty which, of course, I did not get any pleasure from.

It was an awful case. He was a very pleasant young man but after reviewing the record as I did last night, I would impose the same sentence today.

Q Judge, I would show you Exhibit 16 and 17, which the State filed in the trial court in this case, these being the psychological reports of Dr. Barnard and David Lane and ask you if you had an opportunity to examine these reports?

A Yes, I have had the opportunity to examine them as well as other exhibits that were attached from lay individuals.

Q Referring to the witnesses' statements, Exhibits 2 through 15--

A I have read those, also.

Q And you had an opportunity to review this case?

A Yes.

Q Judge Fuller, I would ask you, in your experience today, if those matters had been presented to you and this case had been presented to you exactly as it is presented here, including these exhibits, assuming all of these exhibits are absolutely correct and not subject to any change from cross examination or anything else, would these exhibits have in any way affected your determination and your judgment as reflected in your order in this case?

[Objection overruled]

BY MR. FOX:

Q Do you understand the question?

A Yes, sir, were I to have the folks that were good enough to give affidavits before me in court and heard their testimony and it was consistent with the contents of their affidavits and were these people to have been the best witnesses that I have ever seen and were they to be the most be-

lievable people that I have ever seen and I assessed them as the best from a demeanor point of view and everything else, that information would not have changed my opinion then nor would it have changed my sentencing were I to give it today.

Inasmuch as what David Washington told me himself at the time of his plea or at the time of the sentencing, the economic problems that he had, all about dollars and cents, problems with his family, perhaps problems with his step-father, most people who have found themselves in those circumstances, unfortunately have a rather depressing background.

I recognized that and I had a great deal of thought about David Washington, but the extensive amount of circumstances in this case, and six that are of an aggravating nature just outweighed everything else

and I don't think any other judge that had the same facts in front of him today or at the time would have made a different decision.

Q Do you have any doubts whether the death penalty was appropriate?

A No, sir, no doubt at all.

Q Do you have any doubts as to whether your judgment was correct in this case?

A Thank you, I appreciate your saying "in this case."

I have labored over this and it is, in fact, correct if in fact, there is a death penalty, then this is a death penalty case.

MR. FOX: No further questions.

CROSS EXAMINATION

BY MR. SHAPIRO:

Q Good afternoon, Judge Fuller. My name is Richard Shapiro and I represent

the petitioner, David Washington.

A Nice to meet you.

Q It is nice to meet you, Judge.

You did mention the seriousness of a capital case.

Would you view a capital case the most serious kind of proceeding in a criminal case in terms of ultimate punishment?

A I don't think we can get into too great an academic argument about that. It is kind of final.

Q With respect to the handling of a capital case, would you describe what you think an attorney handling a capital case should do in presenting the case for presentation at a sentencing hearing?

A I haven't found a case of the thousands I have handled that have been handled in the same fashion.

Roy Black would spend a lot of time

on one aspect and not on another because he is better on one part than another.

I have a hard time telling you what I would expect someone to do under certain cricumstances because each case is different.

But I found nothing about what Bill Tunkey did that was inconsistent with what I thought should be done.

Q Would you say a thorough pre-sentencing investigation of the person's background is an important feature of the sentencing?

A Yes, and a lot of that has to do with the relationship of the individual and his attorney.

In this case, there was another lawyer with Mr. Tunkey, who was Mr. Pollack who was out of the same firm who, I understand, the family wanted to be there.

This is almost when it came up for plea when Bill Tunkey came before the Court and said he was trying to steer his client in one direction and he kept going off in another direction and this is what is so unusual about this, that every effort had been made by competent counsel to restrict the communications of his client to the police and in spite of that he went ahead and did it anyhow. This is not a usual thing.

Q I recognize it is unusual, but in terms of preparing and in making sure of the most informative decision about sentencing, would you say that it is absolutely essential that an attorney representing a defendant in a capital case conduct a thorough pre-trial investigation of all the circumstances of the offense and of the offender?

A I don't want you to place me in the position of an advocate which you are doing. All I am saying to you is that Mr. Tunkey related to me in the hearing, although he suggested certain things be done and not be done which were contrary to what Mr. Washington did and did not, in fact, do, when Bill Tunkey said not to plead guilty, this was the most unusual part.

Q What I am trying to get at, in terms of making the sentencing decision whether a person should live or die, isn't it your practice to want to be informed of all circumstances of the offense and the offender so you are making a reliable decision about the defendant's [fate]?

A I think all judges want to have as much information as is available so as to make a considered intelligent opinion.

That doesn't mean that I have to know everything about everything involving every case. That could never happen.

So, I can't say to you that because a lawyer doesn't talk to a grandmother that that is fatal and that is what you want me to say by the way you are phrasing your question on complete family background.

I can't say that. All I can say to you is that I was provided with sufficient information to make an intelligent decision.

The information was supplied in good part by the defendant under circumstances that were quite pleasant and quite cooperative.

Q Maybe I can ask you in a different way.

If you were called upon to represent a defendant in a capital case, would you feel it was part of your responsibility

to effectively represent this person, to conduct a thorough investigation into the background and circumstances of the individual and the offense?

A I would satisfy myself that I knew sufficiently about the case to proceed and I would also tell you that were I to represent someone who did not want my representation or did not want to follow the advice that I gave him, I probably would not be involved in the case.

Q Did you have any discussions with Bill Tunkey regarding the investigation he had undertaken?

A You have the transcript.

Q I am talking about any off the record discussions.

A I, a long time ago, learned that you do not have off the record discussions with lawyers and off the record discussions were not held in my courtroom and lawyers

were not welcome in my chambers. I did not discuss pleas.

Q In that course, you would not want to conduct something in a capital proceeding that was off the record?

A I don't know what you mean by "conduct."

Q You would never have had a discussion with an attorney in a matter that is as important as a capital case off the record?

A You know, I can't tell you if something is passed on the way to the kitchen or if some comment is made.

All I can tell you is as it related to the substance of the case, my courtroom is run on the record and I think I discussed that with Mr. Washington and Mr. Tunkey and Mr. Pollack in part of the conversation regarding the plea to be certain that nobody other than in the

courtroom had knowledge of what had happened in the courtroom had taken place before.

Q Is your assessment of the testimony itself, that you viewed the crimes as so serious that there was no mitigating circumstances that would have led you to impose the sentence you imposed?

As I understand your testimony on direct examination, the crimes were so serious that there was nothing in mitigation that would have led you to impose a different punishment?

A I can't say that. I can't imaging what might have been said, but I know I sat there for quite a long time and looked at the photos and the weapon and I knew that I knew about the facts that David Washington wanted me to know about that he had related to me at some length relating to his family problems and economic

problems.

But the Supreme Court said it is not an addition-subtraction issue.

Q I am just trying to clarify your testimony on direct.

As I recall your testimony and if it is a misstatement, please tell me, that these crimes were so serious that you could not conceive of any facts in mitigation that could have led to a life in prison sentence.

A I said I didn't find any facts that were sufficient in mitigation to have offset the positive findings of aggravating circumstances.

There were something like five or six out of the eight possible and you and I are aware that one aggravating and no mitigating would be technically sufficient for a trial Judge to impose a death penalty.

Q Are there any factors that you could have thought of in mitigation that would have led you to impose a different punishment in this case?

A There could have been a doctor testifying that he was insane. But there was no such evidence.

As a matter of fact, the evidence that he was quite sane.

Q Where was that evidence?

A Dr. Jacobson's letter on the evaluation he did.

Q And you reviewed that prior to the sentence?

A That came to me as soon as it was out from the Magistrate. It was ordered by either Judge Klein or Judge Tanksley and it was given to me.

Q And it is a standard procedure to make this available to defense counsel?

A Of course, whatever is in the

court file.

Q Do you recall discussing with Mr. Tunkey the contents of Dr. Jacobson's report?

A No, sir, I sure don't.

Q Do you recall advising Mr. Tunkey that you were considering Dr. Jacobson's report in formulating your decision?

[Objection overruled].

A Everything that the Court considered in the imposition of the sentence in this case was available to counsel.

I think I filed either an affidavit with the Supreme Court of Florida or included it in the order or in the findings that I had made.

I considered nothing about this case that was not available to counsel.

Q Besides the insanity of the defendant, what other factors in mitigation, if presented, would have led you to impose

a different sentence?

A You got five or six of them by statute. If I had evidence about those, I would have made my finding on that.

I had no such evidence and didn't do it and I don't know of any such evidence to this date that relates to those.

Q Did you know at the time of the sentencing that David Leroy Washington had been abused when he was a child?

A I am not sure whether that was in the statement he made to me at the time of the plea.

If it was, I knew about it. If it was not, I had no other independent knowledge.

So, it would have had to come from the affidavit that I was asked to review and give my thoughts on which I have.

Q Did you have any information at the time of the sentencing that Mr. Washington

had been shifted back and forth between his grandmother and his mother when he was a child?

A I would have to read line for line and if it is not in the transcript of my communications with Mr. Washington and his counsel in open court, I did not know it and the best way I can tell you, until I read the affidavits last night.

I have the same opinion. It hasn't changed my opinion and it wouldn't have changed my opinion at the time.

Q And there is nothing about the relationship between Mr. Washington and his childhood and the circumstances surrounding the time that would, in any way, affect your judgment as to the propriety of the death penalty?

A That is true.

Q So then, the only factor that would have changed your mind in this case with

respect to the propriety of the death penalty was the fact that he was insane at the time?

A No, that is not what I said. I said any of the other enumerated factors in the statute that are mitigating circumstances and anything else I could have heard, because the trial Judge is not limited to mitigating factors.

I can't think of any, but I wouldn't close the door. The Supreme Court said we cannot close the door. We have to hear everything in mitigation.

MR. SHAPIRO: May I have a moment, your Honor?

THE COURT: I have information that Mr. Washington has arrived at the airport and may be on his way here.

MR. SHAPIRO: Fine.

BY MR. SHAPIRO:

Q And you have had an opportunity to review the report of Dr. Lane and Dr. Barnard?

A Yes, sir.

Q And you testified that none of this information would have in any changed your opinion as to the presentation or absence of statutory mitigating circumstances?

A That wasn't what I testified to.

Q Well, is it your testimony that none of this information would have in any changed--

A I said my testimony, sir, was had I had that information presented to me at the hearing, had it come from the most favorable witnesses from a demeanor's point of view or from physicians that I had appointed to make independent studies, that that information would not have

changed my opinion that this was a death penalty case.

Can I go a little further? I would like to say to you that I looked at that case very gravely, that it was the first time that I had imposed the death penalty and I had a number of cases previously that I had not imposed the death penalty and that I was well aware at the time, as I am today, that a basis for setting aside of a case could be incompetency of counsel and that I, myself, on direction of the Florida Supreme Court, handled a case where I set aside a death case because of incompetency of counsel.

I do not like to try a case twice and I was trying to do everything I could to make sure this case was tried fairly and I am not patting myself on the back because no judge that imposes a death

penalty can do that, but I watched the lawyers to make sure David Leroy Washington had every shot to not have to go to the electric chair.

Q Judge Fuller, with respect to the mitigating circumstances, would the presence of non-statutory mitigating circumstances have affected your judgment?

A There was some that were non-statutory that did affect my judgment.

The Supreme Court said we could consider anything. I am just telling you that what I heard did not affect my judgment and that the affidavits would not change my mind at all.

Q Are there any mitigating factors that could have changed your opinion?

A How do I know? I wasn't an advocate. I was a Judge. I wasn't searching for facts pro and con.

I was just trying to get everything.

In conclusion, I wasn't trying to do the defendant's lawyer's job or the State's job.

Q I am asking you if there was anything in terms of non-mitigating circumstances--

[Objection sustained].

BY MR. SHAPIRO:

Q Judge, I assume you are familiar with the State vs. Dixon holding that a death sentence is not reached by mere numerical weighing of aggravating and mitigating circumstances, but by the assessment of the totality of circumstances.

A That is why the necessity of the order of findings.

Q Yes, right, and within that totality of circumstances, isn't it true that the testimony and demeanor of the witnesses would be essential to a determination, given a new totality of circumstances,

that that sentence is appropriate or not?

A I don't think that is an appropriate equation to solve it all.

A lot of time we get pre-sentence investigations, you know, that I don't have a chance to review the people that the probation officer has spoken to and they weigh heavily. Sometimes pre-sentence investigations do.

However, it is a purely discretionary matter with the Court. I have ordered them on occasion and certainly I wouldn't have had a chance to review, to evaluate the demeanor of those witnesses but yet I would have considered them.

So, I don't think what you said necessarily follows.

Q Well, properly under the law of the State of Florida, isn't it a responsibility in determining whether a death sentence is appropriate or not, to review the

totality of the circumstances including all of the witnesses that the defendant chooses to present in support of his character, the situation of the offender and the circumstances of the offense?

A We get a number of cases where they are not available and reports come in and we get a number of cases in the pre-sentencing investigation where there is all kinds of letters from people that responded regarding the good character of the defendant. What else can the Judge do?

The Judge considers those things. He attaches to those people great credibility because they are not there and it is only fair to do it that way. How else can it be done?

So, the fact that the witnesses that you have gotten affidavits from were not there, you know, for the purposes of this hearing, I say that they are the greatest

people in the world, but it would not have made any difference.

This is a capital case and I could put all those things in a great big thing in front of me, write them all down and do all kinds of stuff, but it comes out the same. He has got a terrible background. I felt terrible that people in our community have to live like he did. There were bad problems with his family, supporting his family, but that wasn't enough of a mitigating circumstance to the extent that it would outweigh the aggravating circumstances that I enumerated which must have been five or six in each case. These were heinous crimes.

Q Do you know that to properly meet the mandate of State vs. Dixon, that mitigating and all of the factors should be used in reaching an informed sentencing

decision as required by Dixon.

I considered the things the Court had. I went outside and considered everything that I possibly could.

It would have been easier for me to give this man life instead of the chair, much easier.

Q Based on what you read, is it your assessment of the documents that they are cumulative of what you heard in court?

A No, sir, I think there is information in those that I did not have in court. But I think the additional information doesn't change the outcome. I don't want these things to come back.

Q You feel that the death penalty was mandated in this case by the nature of the crime?

A I think after I heard all of the evidence in open court that was presented

by this young man, the cross examination by his counsel, everything both sides put on, I didn't have any other choice.

MR. SHAPIRO: All right. Thank you, your Honor.

[Gardner discussion omitted].

[Recess taken after which the following proceedings were had:]

THE COURT: Have you had an opportunity to talk to Mr. Washington?

MR. SHAPIRO: Yes, I have just a few questions, a series of three or four questions relating to an issue that came up during Judge Fuller's testimony.

[Gardner discussion omitted].

Thereupon:

DAVID LEROY WASHINGTON

was called as a witness by the petitioner and, having been first duly sworn, was

examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHAPIRO:

Q State your full name for the record.

A My name is David Leroy Washington.

Q Where are you presently incarcerated?

A Florida State Prison on Death Row.

Q Now, going back to the time of your guilty plea proceedings and sentencing hearing in 1976, do you recall the proceedings at that time?

A Yes, I do vaguely, but I can recall most of it.

Q Do you recall having any discussions with Mr. Tunkey about the presentation of your case at the sentencing hearing?

A I can't recall.

Q Do you recall discussing a report prepared by a Dr. Jacobson with Mr. Tunkey?

A No, I don't remember discussing any

kind of report with Mr. Jacobson.

I am not saying I didn't, but I don't remember discussing it.

Q Do you recall Mr. Tunkey ever discussing with you a psychiatric report which concluded that you were sane at the time of the offense and competent to stand trial?

A Yes, I do.

Q You recall him discussing that report with you?

A I recall standing in front of Mr. Fuller saying I was sane. I don't recall discussing any report.

Q Any report with Mr. Tunkey?

A Right.

Q But you recall standing in front of Judge Fuller?

A Yes, sir.

Q I am talking about a discussion you

might have had about a written report prepared by a Dr. Jacobson.

A No, I don't remember.

MR. SHAPIRO: Thank you. No further questions.

THE COURT: Cross examination.

MR. FOX: No, your Honor, I have no questions.

[Gardner discussion omitted].

[EXCERPT OF] MOTION FOR REHEARING AND/OR
NEW TRIAL (U.S. DIST. CT.)

Now comes the petitioner, DAVID LEROY WASHINGTON, through counsel and moves this Court, pursuant to Federal Rules of Civil Procedure 52(b) and 59, for a rehearing of the order denying his petition for writ of habeas corpus, filed on April 15, 1981, and for a further evidentiary hearing in the above-captioned matter.

In Support of this motion, counsel asserts the following:

1. Subsequent to the signing of a Death Warrant by the Governor of Florida on March 13, 1981, the petitioner's counsel, in preparation for an evidentiary hearing in state or federal court, sought to have Dr. Jamal Abdullah Amin, a black psychiatrist in Tallahassee, Florida,

examine the petitioner.

2. Counsel sought Dr. Amin's assistance for several reasons. First, while a psychiatric report had been prepared by Dr. George Barnard, counsel was concerned that all of the relevant facts and conclusions might not have been properly developed at this interview, because David Washington is black and Dr. George Barnard is white and because their socio-cultural backgrounds were very different. Therefore, counsel sought to ensure, in a matter of consequence, where the petitioner's life is at stake, that a sensitive psychiatric interview was not hampered at all by the different races or backgrounds of the participants. This concern would have been obviated with Dr. Amin as the examining psychiatrist, since he is, to Dr. Amin's knowledge, the

only black psychiatrist in Florida.

Second, Dr. Amin had a very similar socio-cultural background to David Washington. Consequently, this would allow for the appropriate rapport at an interview that would ensure, as much as humanly possible, that a correct picture of Mr. Washington's mental state at the time of the crimes would be presented to the state or federal judge who might preside at an evidentiary hearing.

Third, Dr. Amin - a graduate of Harvard Medical School and the Harvard School of Public Health (See resume, Attachment A to this Motion) - has excellent credentials and would make an extremely credible witness in his area of expertise.

3. Unfortunately, Dr. Amin was unavailable to conduct an examination until mid-April 1981.

4. On April 7, 1981, this Court granted petitioner's application for stay of execution. At this time, the undersigned counsel had already started preparations for Dr. Amin to visit the petitioner at Florida State Prison within the next week to ten (10) days.

5. An evidentiary hearing was thereafter scheduled by this Court for April 10, 1981, at 1:30 p.m.. Petitioner was brought to this hearing from Florida Starke Prison (Starke, Florida). The immediate scheduling of the hearing foreclosed any opportunity for the petitioner to present any testimony or even a psychiatric report from Dr. Amin, since Dr. Amin was unable to interview the petitioner prior to April 10, 1981.

6. At this hearing, petitioner's counsel objected to the use of affidavits, rather

than live testimony, and advised the Court that there were other witnesses he would present in petitioner's behalf at an evidentiary hearing where live testimony could be introduced.

7. Although Dr. Amin was available to see petitioner during the week of April 13th, the petitioner was not returned to Florida State Prison from Miami until on or about April 15, 1981. On or about April 14, 1981, petitioner's counsel arranged for Dr. Amin to interview Mr. Washington on April 16, 1981.

* * *

SS: Richard E. Shapiro

[EXCERPT OF ATTACHMENTS TO MOTION FOR
NEW TRIAL]

TO: Richard Shapiro, Attorney at Law
Southern Prisoners Defense Com-
mittee
344 Camp Street, Suite 708
New Orleans, Louisiana 70130

FROM: Jamal A. Amin, M.D.

RE: Mr. David Washington
Independent Pyschiatric Evaluation

DATE OF
REPORT: April 20, 1981

PURPOSE AND METHODOLOGY

Mr. David Washington is a 31-year-old Black male (date of birth, 12/13/49) seen in psychiatric evaluation at Florida State Prison in order to offer my professional opinion concerning his past and present mental status, particularly his state of mind prior to and during a ten day period in 1976 during which he reportedly committed three murders. Particular emphasis was placed upon socio-cultural factors which had not been reached in prior reports.

In addition to interviewing Mr. Washington an extensive review was done of Mr. Washington's legal records, records of past psychiatric and psychological evaluations as well as reports from relatives and friends.

CURRENT SITUATION

Mr. Washington is currently incarcerated on Death Row at Florida State Prison. He is not being treated for any specific physical or mental condition. He spends most of his time reading and writing to numerous correspondents. He searches news accounts for reports of persons in stressful situations and writes to give them encouragement. He has few visitors although both he and his family report that it is economics rather than lack of concern that prevents their visiting. He is perceived by prison officials as a good and quiet prisoner.

SIGNIFICANT HISTORY

Mr. Washington is the oldest seven children raised in a chaotic, segregated, poverty-ridden environment. The children had various fathers. His childhood was plagued by physical abuse, particularly from his step-father. I observed on Mr. Washington's back and thighs scars which are consistent with severe lacerations from beatings. Most of his youth he was raised by his grandmother. There was little stability in the home situation because of frequent moves and his temporary returns to the household of his mother and a series of stepfathers. Because of his thinness, he was nicknamed "pee-wee," an appellation he carries to this day. Mr. Washington began to work at a young age to contribute to the household expenses, particularly to assist his grandmother and younger siblings. School

attendance was erratic at best. Positive male identity figures were particularly lacking. As the oldest child, Mr. Washington himself was viewed by his siblings as a father figure with enormous psychological responsibility for which he was ill-equipped.

One of the step-fathers had sexual relations with one of Mr. Washington's sisters, an event which deeply disturbed Mr. Washington. Physical abuse of the children and their mother occurred frequently. Mr. Washington related that on at least one occasion his step-father beat him sporadically for an entire night, threatening worse treatment should the child dare to move when the step-father dozed into a drunken stupor. At least one sister required medical attention as the result of severe beatings. There was constant alcohol abuse among the other males of the family: grandfather, step-fathers, and brothers.

Despite the instability and acts of violence against him, there are no reports of prior crimes of violence nor of any drug or alcohol use by Mr. Washington, normal outlets under such stress. He twice attempted to enter the military but failed the entrance examination.

Mr. Washington perceives his only positive accomplishments as his skill at basketball and at playing several musical instruments. One of his dreams had been to attend Florida A & M University, a predominantly Black school, to join the Marching 100 (the school's renown marching

band) and to play in the Orange Blossom Classic, an annual event significant to thousands of Florida's Black citizens. Feeling his dream impossible due to his poverty and lack of education, he once stole a band uniform and had himself photographed wearing it, the closest to his goal he felt he would ever reach.

He also dreamed of visiting art galleries, museums, and foreign countries, but felt his economic and social status made these dreams unfulfillable.

Mr. Washington was normally employed. He attended church regularly and participated in the choir.

In late 1974 his job was terminated because of the recession and his lack of seniority. He received unemployment benefits which eventually terminated. He was unable to find other employment. By September 1976, his wife was about to give birth to a second child. Mr. Washington was still unable to find work. He managed to borrow money from neighbors and relatives but not enough to support himself or his family. The utilities in his home were turned off because of delinquent accounts. He and his family were living literally hand-to-mouth, battling for survival.

Mr. Washington experienced an increasing and overwhelming sense of powerlessness -- literal impotence -- and lack of control over life. He entered a series of illicit affairs, resulting in the conception and birth of several children. These liaisons

were his desperate attempts to prove and maintain his manhood. Perhaps because of his refined features, it was not uncommon for him to be approached by homosexual men, advances which threatened him, but which he repelled. During this period, his identify depended upon his ability to be successful with women. Mr. Washington also found some solace in his church activities.

FACTS OF THE CRIMES

1. Rev. Pridgen. A day or two before the last encounter with Rev. Pridgen, a homosexual Black minister, Mr. Washington had engaged in a sexual act with Rev. Pridgen. Money was exchanged. Disgusted with himself and Rev. Pridgen, Mr. Washington nevertheless returned to the minister's house to engage in sexual acts and to rob him. In the midst of this sexual act, Mr. Washington focused upon the religious pictures in Rev. Pridgen's bedroom and began frantically to stab him. He ransacked the apartment looking for money and then left.

2. Mrs. Birk. Mr. Washington had often sold stolen property to Mrs. Birk and her husband. He suspected they would have a large amount of cash in their home. Intending a robbery, he expected to find Mrs. Birk alone and was surprised to find three other women there as well. He had not intended to harm anyone, panicked when Mrs. Birk apparently moved towards a telephone, and he began stabbing and shooting everyone.

3. Mr. Meli. Intending to net more money, Mr. Washington contacted Mr. Meli about buying Mr. Meli's car. He took Mr. Meli's car, sold it, and returned to his home where Mr. Washington's brother and a friend were holding Mr. Meli. They reported that a struggle with Mr. Meli had occurred. Mr. Washington said that the two others left and that he then stabbed Mr. Meli to death. He became aware of his actions only when Mr. Meli began reciting the Lord's Prayer. Two days later Mr. Washington surrendered to police.

MENTAL STATUS EXAMINATION

Generally friendly. Good rapport. Appropriately dressed in neat prison clothing. Normal facial expressions. Poor eye contact consistent with feelings of shame. His speech was productive. Thought content examination revealed no overt thought disorder at the time of the interview.

He was oriented to time, place, person, and situations and had good contact with reality. Recent memory was intact but remote memory appeared somewhat impaired. He appears to be of average intelligence. He wept openly during parts of the interview. He repeatedly expressed his sorrow and regret about his actions and his affect was consistent with those feelings. His mood was one of despair and worthlessness.

FORMULATIONS AND IMPRESSIONS

David Washington's life until the time

of these crimes was marked by poverty, physical abuse, and instability. He had no positive male identification figures. He did not resort to use of drugs or alcohol as outlets for tension. He did not commit crimes of violence. He romanticized people he viewed as successful. Church was important to him. The stress he faced in September of 1976 was intolerable to him: no work, no income, utilities turned off, wife giving birth, taunts from relatives. His only perceived way of proving his manhood was by fathering children. Although I am aware that Mr. Washington's account to me of the first crime differs in some ways from his prior court statements, nevertheless, it is my opinion that his account to me is the accurate one. In my professional opinion, Mr. Washington has been unwilling to admit -- even to himself -- any prior sexual involvement with Rev. Pridgen. To Mr. Washington that involvement was disgusting, disgraceful, unredeemable, and totally ego-shattering. Due to our similar socio-cultural backgrounds, I was able, carefully, to coax these admissions from him. He perceived that encounter as destroying his last remaining vestiges of ego strength. While unconfirmed, I strongly suspect that Mr. Washington had been the victim of a violent homosexual attack, probably during his only other prison commitment (for breaking and entering) at the age of 18. It was in many respects easier for him to acknowledge responsibility for the murders than to acknowledge this ego-shattering, albeit temporary, involvement.

At the time of the first crime, Mr.

Washington suffered an overwhelming homosexual panic which triggered a violent dissociative hysteria. He acted out his rage, protesting the destruction of himself and his idealized image: the church leader who was a homosexual. Ministers in the Black community are people of enormous status. Experiencing overwhelming mental and emotional stress, Mr. Washington could not tolerate seeing the flaws in his image. His reality became to him intolerable.

This episode began a 7 - 14 day violent hysterical, dissociative reaction, characterized by an inability to resist wrongful images. Although at some level he knew they were wrong, he felt internally compelled to commit these acts. He experienced uncontrollable rage and subsequent amnesia for detail. These actions were caused by extreme emotional and mental duress with which he was incapable of coping.

Mr. Washington experienced a syndrome similar to battle fatigue, commonly called shell shock. Sufficient stress can produce this aberrant behavior in otherwise normal people. There is an extreme vulnerability to psychotic acting out during which time there is a temporary absence of usual human sensitivities.

Mr. Washington is a man of average intelligence and of non-violent history. It is easily discernible that all three of these crimes were stupid and senseless, totally inconsistent with his prior or subsequent conduct. These were senseless--

but powerful and some what cathartic acts -- during which his normal consciousness was displaced by the stresses which themselves became manifest. The stupidity of crimes is consistent with his being totally out of control and wanting to be stopped. He did not flee the area and he surrendered to police.

It should be noted that I had difficulty believing Mr. Washington's account of the third crime and I believe that he was protecting his brother in his accounts to me.

CONCLUSION

Mr. Washington's early life was chaotic, fraught with economic deprivation, physical abuse and violence toward him. He has no prior reports of violent crimes.

At the time of these crimes, Mr. Washington knew right from wrong but was totally unable to conform his conduct to the requirements of law due to psychotic disturbance. He suffered extreme emotional and mental distress which resulted in a violent hysterical disassociative reaction.

At the time of this interview, Mr. Washington was remorseful and sorrowful. He wept openly about the acts he has committed.

Respectfully submitted,

Jamal A. Amin, M.D.

[EXCERPT OF] ORDER DENYING MOTION FOR
REHEARING OR NEW TRIAL (U.S.D.Ct.)

THE ABOVE CAUSE is before the Court on petitioner's motion for a rehearing or new trial under Rules 52(b) and 59, Fed. R.Civ.P.

Petitioner's motion is predicated on the psychiatric report of Dr. Jamal Abdullah Amin who examined petitioner on April 16, 1981 and whose report concludes that events in Washington's background and in the period immediately preceding the first murder triggered a

. . . 7-14 day violent hysterical, dissociative reaction, characterized by an inability to resist wrongful images. Although at some level he knew they were wrong, he felt internally compelled to commit these acts. He experienced uncontrollable rage and subsequent amnesia for detail. These actions were caused by extreme emotional and mental duress with which he was incapable of coping. . . . At the time of these crimes, Mr. Washington knew right from

wrong but was totally unable to conform his conduct to the requirements of law due to psychotic disturbance. He suffered extreme emotional and mental distress which resulted in a violent hysterical dissociative reaction.

The significance of the report is that it provides the first indication that evidence may exist which shows that at the time of the offenses, defendant was under the influence of extreme mental or emotional disturbance or that he was unable to conform his conduct to the requirements of law. These factors are within subsections (b) and (f) of the mitigating circumstances set forth in the death penalty statute, Fla.Stat. Ann. §921.141(6).

Despite the submission of this most recent report, I nonetheless find there is insufficient basis to conclude that prejudice flows from counsel's failure to require psychiatric investigation of Mr.

Washington prior to sentencing. Lovett v. Florida, 627 F.2d 706, 710 (5th Cir. 1979); Davis v. Alabama, 596 F.2d 1214, 1221-23 (5th Cir. 1979) vacated as moot, 446 U.S. 903, on remand vacated, 623 F.2d 366 (5th Cir. 1980). I base this finding on the following facts contained in the record to date:

(a) Dr. Amin's conclusions appear to be largely premised on statements only recently made by Washington, including his admission as to a prior homosexual incident with Reverend Pridgen, the first murder victim. This admission had not been made in 1976, and it does not appear that psychiatric evaluation prior to or at a time closer to sentencing would have revealed this information.

(b) Although both Dr. Amin's background and report are impressive, he reaches conclusions which are directly contrary to those of Dr. Jacobson in October, 1976, Psychologist Lane in March, 1980, and Psychiatrist Barnard in May, 1980.

Counsel's performance must be evaluated on the basis of information which would

reasonably have been available at the time of sentencing if he had made an investigation of Washington's background. I find there is insufficient basis to conclude that findings consistent with Dr. Amin's report would have been available to counsel if an independent psychiatric report had been obtained in 1976. I believe Dr. Amin's report must be evaluated in light of the often quoted reminder that an allegation of counsel's ineffectiveness is not to be judged by hindsight. Lovett v. Florida, supra at 708; Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974).

Having reviewed Dr. Amin's report, and based on the conclusions set forth above, it is

ORDERED AND ADJUDGED that the motion for rehearing or new trial is DENIED.

DONE AND ORDERED at Miami, Florida,

[R98]

508

this 28th day of April, 1981.

COPIES FURNISHED:

Calvin Fox, Esq.

Richard Shapiro, Esq.

UNITED STATES DISTRICT JUDGE

[EXCERPT OF] NOTICE OF APPEAL
(U.S.D.Ct.)

COMES NOW, petitioner, DAVID
LEROY WASHINGTON, in the above-captioned
proceeding and hereby notices his appeal
from the order of the District Court on
April 15, 1981, denying the relief
requested in his petition for a writ of
habeas corpus.

APRIL 24, 1981 RICHARD E. SHAPIRO
344 CAMP STREET - SUITE 708
NEW ORLEANS, LA 70130
(504) 581-3647

[EXCERPT OF]: NOTICE OF APPEAL
(U.S.D.Ct.)

NOTICE IS HEREBY GIVEN that the Respondents, CHARLES STRICKLAND, LOUIE L. WAINWRIGHT AND JIM SMITH, Attorney General, their undersigned attorney, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Order entered herein on the 15th day of April 1981 and filed on the 15th day of April 1981, and rendered final on April 28, 1981, when the trial court granted a certificate of probable cause and denied the Petitioner's Motion for Rehearing or New Trial.

RESPECTFULLY SUBMITTED, on this 21st day of May, 1981 at Miami, Dade County, Florida.

JIM SMITH
Attorney General

CALVIN L. FOX, Esquire
Assistant Attorney General
Suite 820
401 N.W. 2nd Avenue
Miami, Florida 33128

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Office: Supreme Court, U.S.
FILED
MAY 11 1983
ALEXANDER L. STEVENS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1982

NO. 82-1554

CHARLES E. STRICKLAND, SUPERINTENDENT
FLORIDA STATE PRISON, JIM SMITH, ATTORNEY
GENERAL OF FLORIDA, AND LOUIE L. WAINWRIGHT,
SECRETARY OF FLORIDA DEPARTMENT OF CORRECTIONS,

Petitioners,

-vs-

DAVID LEROY WASHINGTON,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Richard E. Shapiro

CN-850
Trenton, New Jersey 08625
(609) 292-1693

QUESTIONS PRESENTED

1. Whether the petition for writ of certiorari to consider the constitutional standard for review of claims of ineffective assistance of counsel at a capital sentencing proceeding should be denied when there is an independent and well-established non-constitutional basis for affirming the judgment of the Court of Appeals.

2. Whether certiorari is inappropriate because the questions presented are not ripe for review, since the Court of Appeals remanded the case to the district court for additional factual determinations which could obviate, or at the very least, clarify the scope of the constitutional questions presented by petitioners.

3. Whether certiorari is inappropriate, since the Court of Appeals' decision provides a fair, but stringent, standard of prejudice for evaluating claims of ineffective assistance of counsel at capital sentencing proceedings, a standard that is wholly consistent with precedent of this Court.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1982

NO. 82-1554

CHARLES E. STRICKLAND, SUPERINTENDENT
FLORIDA STATE PRISON, JIM SMITH, ATTORNEY
GENERAL OF FLORIDA, AND LOUIE L. WAINWRIGHT,
SECRETARY OF FLORIDA DEPARTMENT OF CORRECTIONS,

Petitioners,

-VS-

DAVID LEROY WASHINGTON,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, David Leroy Washington, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the Fifth Circuit (Unit B) (en banc) in this case. That opinion is reported at 693 F.2d 1243. In this brief in opposition, the respondent will discuss several substantial reasons why this case should not be heard by the Court.

JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court to review this case by petition for writ of certiorari under 28 U.S.C. 1254(1). Respondent does not take issue with petitioners' statement of jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners have identified and set forth the constitutional and statutory provisions involved in this cause.

STATEMENT OF THE CASE

The respondent, David Leroy Washington respectfully refers this Court to the statement of the case set forth in the opinion of Judge Vance for the en banc court of appeals. (App. 4-19).¹ Several aspects of the record deserve special emphasis, however, because they frame the issues of ineffective assistance of counsel and provide a backdrop for a proper understanding of this case.

It is a critical historical fact, found by the district court, that Mr. Washington's trial counsel, William Tunkey, ceased any serious preparation or investigation of Mr. Washington's case approximately one month after being appointed, because he was immobilized by a "hopeless feeling" upon learning that Mr. Washington had confessed to two capital murders in addition to the one on which Tunkey was representing him. [R. 52, E.H. 19, 20-22, 57].² Tunkey acknowledged that after these confessions, he did not feel that "there was anything which [he] could do which was going to save David Washington from his fate." [E.H. 35].³

The district court found that "this feeling was behind [Tunkey's] failure to do an independent investigation into petitioner's background and potentially mitigating emotional and mental reasons for the killings" [R. 61], as Tunkey admitted at the evidentiary hearing. [E.H. 25-26, 28-29].⁴ Tunkey's despair caused him to cease functioning as Mr. Washington's advocate in all but the most minimal way.

Tunkey's awareness of the strong likelihood that Mr. Washington would be convicted of three capital murders, however, should have been

¹ "App." refers to the separate Appendix to Petitioners' Petition for Writ of Certiorari.

² Volume I of the record below will be referred to as "R."; Volume II, the transcript of the evidentiary hearing, as "E.H."; Volume III, the hearing on the stay of execution as "S.H."; and the transcript of the state court sentencing hearing as "Sent. H."

³ Mr. Washington surrendered to police on the first murder charge on October 1, 1976. [Sen. H. 121-22.] On October 7, 1976, Mr. Tunkey was appointed to represent Mr. Washington on the first murder charge and related crimes. [E.H. 11-12.] On November 5, 1976, Mr. Washington confessed to two additional murders. [Sent. H. 21, 81, 82-94.] On December 1, 1976, he pled guilty to three charges of capital murder and several other crimes. Petitioner's sentencing hearing was conducted on December 6, 1976, and he was sentenced to die on that date.

⁴ Prior to learning of the confessions, counsel had been directing his efforts towards pre-trial motions and discovery. He had not conducted any separate investigation or preparation for the sentencing phase. [R. 52.)

the beginning and not the end of his efforts on Mr. Washington's behalf. Under Florida's bifurcated capital sentencing procedure, there is first a guilt phase and then a separate sentencing phase "to determine whether the defendant should be sentenced to death or life imprisonment." Fla. Stat. Ann. §921.141 (1). At the time of Mr. Washington's conviction, Florida law provided that at this sentencing hearing "evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated [in the statute]." Id.⁵ In July 1976, several months before Mr. Washington's surrender to the authorities, this Court had sustained the constitutionality of the Florida death penalty statute, because that statute on its face requires the sentencer to focus on the individual circumstances of the crime and the character of the offender. Proffitt v. Florida, 428 U.S. 242, 251, 252 (1976).

Mr. Tunkey was wholly unprepared to participate as an advocate for Mr. Washington in this type of sentencing inquiry. Other than some conversations with Mr. Washington in jail, and some futile efforts to meet with Mr. Washington's wife or mother after briefly speaking with them on the telephone [R. 52-53], Tunkey conducted no investigation for witnesses who might provide mitigating information about Mr. Washington's character or background [R. 52]. Moreover, despite Tunkey's recognition from his interviews with Mr. Washington that there was "an absolutely inexplicable difference between the personality [of Mr. Washington] which I knew as compared to the crimes charged and the admissions he had made" [E.H. 39], Tunkey never sought a psychiatric or psychological examination of Mr. Washington for evidence of statutory or nonstatutory mitigating factors relating to Mr. Washington's mental state at the time of the offenses.⁶

⁵ Fla. Stat. Ann. §921.141(1)(1981 Supp.) has since been amended and now provides:

"In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in [the statute]."

⁶ The Florida statute enumerates two mitigating circumstances pertaining to a defendant's mental state: Fla. Stat. Ann. §921.141(6)(b) ("The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance"), and Fla. Stat. Ann. §921.141(6)(f) ("The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law as substantially impaired").

Having failed to conduct any independent investigation into Mr. Washington's character and background or to seek any expert evaluation of Mr. Washington's mental state at the time of the crimes, Mr. Tunkey decided that he

"really could find very little to address [him] self to in terms of a relevant, cogent presentation of mitigating circumstances as outlined by the statute itself and certainly insofar as aggravating circumstances are concerned, [he] did not feel exactly like [he] had sufficient ammunition to persuade anybody that the State was not going to succeed in showing at least that they outweighed the mitigating circumstances." [E.H. 37.]

He thus decided that at the sentencing hearing he would "attempt to convince the judge of Washington's sincerity and frankness in pleading guilty, recognizing the sentencing judge as a judge who had acknowledged his respect for individuals who came before him in the court and admitted their guilt." [R. 53, E.H. 36.] After Mr. Washington entered his guilty plea to three capital murders, Tunkey offered no testimony at the sentencing hearing in support of a life sentence, but relied solely upon certain portions of Mr. Washington's testimony at the guilty plea proceedings. [Sent. H. 158.]⁷ In his argument at the close of the hearing, Tunkey made no mention of Mr. Washington's family life or background, nor did he suggest that there was any independent information about Mr. Washington's character and life history, or mental state at the time of the crimes,⁸ that should be considered by the sentencing judge.⁹

In point of fact, as now appears from the record before this Court, Tunkey could have presented a substantial amount of readily available

⁷ At these proceedings, Mr. Washington acknowledged his guilt and briefly referred to the pressure he was under at the time of the crimes. [Guilty plea proceedings at 19, 24-25.]

⁸ Although Tunkey had asked the court in his sentencing memorandum to consider, as a mitigating circumstance, that "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance" (see note 6 *supra*), he made no explicit reference to the nature of Mr. Washington's mental state at the time of the crimes. Tunkey never requested a presentence report on Mr. Washington's mental state, social background or life history. The district could below found that such a presentence report "may have provided additional independent information in mitigation of the aggravating circumstances previously shown." [R. 69.]

⁹ The district court did not find counsel's perfunctory closing argument, standing alone, to be "persuasive evidence of ineffectiveness" but found that it had to be evaluated "in light of the mitigating circumstances which may have been advanced upon a more complete investigation" [R. 69.]

evidence on the critical issue of whether Mr. Washington deserved to live or die. At the evidentiary hearing in the federal district court, affidavits from Mr. Washington's neighbors, friends, former employers, family members, and community members were introduced. All of the affiants state that they would have testified on Mr. Washington's behalf at his sentencing hearing but were never contacted by anyone involved in his defense.

These individuals all described David Washington as a responsible, non-violent young black man who did not use drugs or alcohol, was an active member of his church, was devoted to his family and eager to work, but was unable to find employment to support his wife and newly-born child. [Exhibits 1-14.] They consistently expressed their belief that the David Washington they knew was not the type to commit a murder; many of them remarked that violent behavior was completely "out-of-character" for him. [Id.]¹⁰

Two affidavits of medical experts -- a psychiatrist and a psychologist -- were also introduced at the habeas hearing. [R. 54.] As the district court found, these experts provided "information relevant to the issue of mental or emotional stress" [R. 58] at the time of the crimes.¹¹ After the hearing, Mr. Washington submitted the affidavit of a second psychiatrist to the district court. This psychiatrist reported that at the time of the crimes Mr. Washington was under the influence of extreme mental or emotional disturbance, and that he was unable to conform his conduct to the requirements of the law (see note 6, *supra*). [R. 90-94.]

Based on this record, the district court found that counsel had failed to conduct an adequate investigation into factors relevant to the mitigation

¹⁰ Leonard Brady, a Dade County police officer, best summed up this view when he observed:

"In all of the years that I have observed deviant behavior as a police officer, I have never seen anyone do something like David has done, with the history and character that David has."
[Exhibit 14.]

¹¹ In brief, the psychiatrist and psychologist concluded that, while Mr. Washington was legally sane at the time of the crimes, his violent actions were attributable to the uncontrollable eruption of long-suppressed feelings of self-hatred and anger generated by the physical abuse and unstable family situation he had experienced as a child, combined with the severe frustration and depression concerning his financial problems. Both doctors noted that Mr. Washington expressed remorse during their interviews with him. [Exhibits 16, 17.]

of Mr. Washington's sentence, and that such an investigation "would have produced generally favorable information from family, friends, former employers, and medical experts" [R. 61] about Mr. Washington's character, background, social history and mental state at the time of his crimes. But for Mr. Tunkey's failure to conduct an independent investigation for those witnesses, this evidence would have been before the tribunal that decided whether Mr. Washington was to live or die.

However, because the district court held that a death-sentenced prisoner must shoulder the additional burden of establishing that the outcome of his sentencing hearing would have been different in the absence of counsel's derelictions of duty, the petition for a writ of habeas corpus was denied (App. 285-86). In reaching this determination, the district court relied in part on the testimony of the state sentencing judge who believed he would have still imposed the death sentence "even if he had considered the live testimony of character and psychiatric witnesses." (App. 285)

A panel of the United States Court of Appeals for the Fifth Circuit (Unit B) reversed the judgment and remanded the case to the district court for the following: (1) to determine whether respondent's trial counsel was ineffective without regard to the prejudicial effect that may have resulted from counsel's errors, and (2) if it finds that trial counsel was ineffective, to grant relief if petitioner proves that "but for his counsel's ineffectiveness his trial, but not necessarily its outcome, would have been altered in a way helpful to him." Washington v. Strickland, 873 F.2d 879, 902 (5th Cir. 1982) (Unit B). Finally, since the admission of the state sentencing judge's testimony had provided an independent basis for reversal, the panel also directed the district court, in assessing the prejudicial impact of counsel's ineffectiveness, to disregard the judge's testimony that the additional evidence would not have affected his verdict.

The en banc court, while reversing the judgment of the district court, sharply circumscribed the scope of the panel's decision in two major respects. First, after comprehensively canvassing the law in this country relating to claims of ineffective assistance based on a failure to investigate, the court concluded that "when a strategic choice by counsel makes unnecessary a certain line of investigation, it is not required that effective counsel pursue that investigation." (App. 19). Second, relying on this Court's recent

5
decisions in United States v. Morrison, 449 U.S. 361, 364-65 (1981) and United States v. Frady, 456 U.S. 152, 170 (1982), the majority rejected the panel's formulation of the standard of prejudice and instead placed the burden upon a habeas petitioner to demonstrate "that ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of his defense." (App. 75).

However, the en banc court did reaffirm the panel's conclusion that a portion of the sentencing judge's testimony at the habeas hearing "was inadmissible evidence that may not be considered by the district court." (App. 77).

Because of its conclusion that the district court failed to make appropriate factual determinations on the issue of ineffective assistance of counsel and that "one portion of [the state sentencing judge's] testimony was inadmissible," (App. 81), the en banc court found it "necessary to remand the case to the district court for further findings." (App. 81).

I.

THERE IS AN INDEPENDENT AND WELL-ESTABLISHED NON-CONSTITUTIONAL GROUND FOR AFFIRMING THE JUDGMENT OF THE COURT OF APPEALS WITHOUT REGARD FOR THE CONSTITUTIONAL QUESTION ASSERTED IN THE PETITION CONCERNING THE STANDARD FOR REVIEW OF CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

The petitioners seek to have the Court review the court of appeals' conclusion that the test of prejudice in United States v. Frady, *supra*, should be applied to claims of ineffective assistance of counsel at capital sentencing proceedings. Petitioners fail to explain that the judgment of the district court must be reversed, and that of the en banc court of appeals affirmed, for independent, non-constitutional error of the habeas court in admitting, over vigorous objection, portions of the state sentencing judge's testimony. For this reason, any ruling by this Court on the constitutional question suggested by the petitioners would be tantamount to an advisory opinion on a constitutional issue since a non-constitutional basis for affirming the judgment of the court of appeals is evident from the record. Under these circumstances, certiorari is inappropriate and should be denied.

In rejecting respondent's claims in his habeas petition, the district court considered testimony of the state sentencing judge "in which he explained his reasons for imposing the death sentence and his probable response to the evidence adduced at the habeas hearing." (A. 77). The en banc majority concluded that "[i]t is a firmly established rule in our jurisprudence that a judge may not be asked to testify about his mental processes in reaching a decision." (A. 77). This rule originated with the seminal 1904 decision of this Court in Fayerweather v. Ritch, 195 U.S. 276, 306-07 (1904). In the intervening eighty years, this rule has never been questioned by this Court or, to respondent's knowledge, by any other federal court. Rather, the Fayerweather principle has been repeatedly reaffirmed by this Court. See, e.g., Chicago B. & Q. Ry. Co. v. Babcock, 204 U.S. 585, 593 (1907); United States v. Morgan, 313 U.S. 409, 422 (1941).

Indeed, as the en banc majority noted, the rule has particular force in the present circumstances because "a rule that allows the probing of the mental processes of a state judge would exacerbate certain problems that are already inherent in the habeas corpus context" (App. 79):

"The tendency of the habeas proceeding to detract from 'the perception of the trial of a criminal case in state court as a decisive and portentous event.'" *Walworth v. Spies*, 433 U.S. at 90, 91 S.Ct. at 2508, is enhanced by the prospect that the state trial judge may be called into federal court several years later to recreate his thought processes at the criminal trial. Additionally, the friction between the state and federal systems of justice can hardly be alleviated by a rule that permits the parties to interrogate a state judge in federal court regarding the basis for his decision. See e.g., *Rose v. Lundy*, 433 U.S. at 101 S.Ct. at 1203; *Sumner v. Mata*, 449 U.S. 539, 550 & n. 3, 101 S.Ct. 764, 771 & n. 3, 66 L.Ed. 2d 722 (1981)." (App. 79-80).

The failure of the district court to exclude evidence that violated the Feyerweather principle was one of the bases for the en banc court's determination "to remand the case to the district court for further findings." (App. 81). Since this non-constitutional evidentiary error of the district court forms a separate and independent basis for affirming the en banc court's judgment, without even reaching the constitutional questions asserted by petitioners, certiorari is inappropriate on the present record.

CERTIORARI IS INAPPROPRIATE BECAUSE
THE COURT OF APPEALS REMANDED THE
CASE FOR ADDITIONAL FACTUAL DETERMINA-
TIONS BY THE DISTRICT COURT WHICH COULD
OBLVIATE, OR AT THE VERY LEAST CLARIFY,
THE SCOPE OF THE CONSTITUTIONAL QUESTIONS
PRESENTED BY THE PETITIONERS

Respondent submits that certiorari is also inappropriate because the present case is not ripe for review in this Court. This court has historically relegated the task of formulating and applying tests of effective representation by counsel to the lower federal courts. Such an approach recognizes that these claims are more appropriately resolved on a case-by-case basis because of the fact-specific nature of the judicial inquiry. The present case is no different, and this Court should await a fully developed factual record before deviating from its traditional manner of handling ineffective assistance of counsel claims and exploring the questions presented by the petitioners.

In a carefully reasoned and well-documented opinion, the en banc court of appeals has established specific requirements for assessing a claim of ineffective assistance of counsel based on a failure to investigate. First, a habeas petitioner must establish that counsel was ineffective (App. 23-53). Second, the habeas "petitioner must show that ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of his defense." (App. 75). Finally, "even if the defense suffered actual and substantial disadvantage, the state may show in the context of all the evidence that it remains certain beyond a reasonable doubt that the outcome of the proceeding would not have been altered but for the ineffectiveness of counsel." (App. 76).

After thoroughly reviewing the decision of the district court, the court of appeals concluded that the present factual record is wholly inadequate to make the critical factual determinations that are essential for a proper resolution of respondent's constitutional claims. Specifically, the court of appeals found

that the district court did not even make the threshold inquiry when a habeas petitioner alleges that counsel failed to conduct an adequate investigation -- the court "did not evaluate the credibility of [trial counsel's] testimony or the reasonableness of his strategy in light of available alternatives." (App. 23). This is a critical "question of fact for the district courts" (App. 49, n. 23), but one on which the present record is wholly barren. It is a factual question whose resolution depends "upon a variety of factors including the number of issues in the case, the relative complexity of those issues, the strength of the government's case, and the overall strategy of trial counsel." (App. 23-24). These are factors which only can be assessed by the district court on the basis of the testimony and evidence at the habeas hearing. As the court of appeals aptly noted:

"In this case numerous factual issues remain to be resolved by the district court before it can be determined with certainty whether counsel was reasonably effective." (App. 33).

But these are not the only fact-specific questions that have not been considered in the first instance by the district court or the court of appeals. Additionally, the district court never considered "whether the [respondent] suffered actual and substantial detriment to the conduct of his defense." (App. 81). Nor did the court ever determine whether, "in the context of the entire case, the detriment suffered was harmless beyond a reasonable doubt." (App. 82-83).

As is evident from the above discussion, the present record is undeveloped for a proper and considered assessment of the questions presented by the petitioners. First, the essential factual findings relating to counsel's ineffectiveness have simply not been made. Clearly, if the district court on remand concludes that trial counsel's strategic choice was reasonable or credible in the particular factual circumstances of the present case, there is really no need for this Court or any other court to

consider what standard of prejudice is applicable. Similarly, if the factual determinations on the issues of actual and substantial prejudice or on the harmlessness of the error beyond a reasonable doubt are unfavorable to the respondent, then the present petitioners would have prevailed in the district court and the petition would be denied.

Simply put, the record is not ripe for this Court's review and consideration of the questions presented by petitioners at this juncture would be premature. Further factual development in the district court could obviate, or at least clarify, the constitutional question presented by respondents. Before this Court deviates from its well-established course in reviewing claims of ineffective assistance of counsel, it should await the crystallization of constitutional issues on a fully developed record. Certiorari is therefore inappropriate in the case at bar, because further proceedings are required before the case is ripe for review.

CERTIORARI IS INAPPROPRIATE BECAUSE
THE EN BANC COURT OF APPEALS' DECISION
IS CONSISTENT WITH THIS COURT'S PRECEDENT

In requiring a habeas petitioner to demonstrate that counsel's ineffectiveness "'worked to his actual and substantial disadvantage,'" (App. 56), the en banc court of appeals adopted the explicit language of this Court in United States v. Frady, 456 U.S. 152, 170 (1982).

Indeed, a review of the court of appeals' analysis of this issue reveals that it is solidly grounded in this Court's precedent and fairly, but stringently, accommodates the interests of the State and the death-sentenced defendant. First, the court of appeals, relying on United States v. Morrison, 449 U.S. 361, 364-65 (1981), rejected any per se rule of prejudice in assessing a claim of ineffective assistance of counsel (App. 57-65). Second, the court concluded that prejudice to the habeas petitioner would not be presumed in these circumstances, but that the capitally-sentenced defendant would still have to show harm from counsel's defalcations. (App. 66-70).

Then, in rejecting the outcome determinative test of prejudice, which has only been adopted in the District of Columbia Circuit,¹²

¹² Contrary to the assertions of the petitioners, the District of Columbia Circuit in United States v. DeCoster, 624 F.2d 196, 208 (D.C. Cir. 1979) (en banc), remains the only federal circuit that has adopted an "outcome-determinative" standard of prejudice in assessing claims of ineffective assistance of counsel. Three Circuits (the First, Fourth and Ninth) have expressed no opinion on the question. See, e.g., United States v. Bosch, 584 F.2d 1113, 1122-23 (1st Cir. 1978); Cooper v. Fitzharris, 586 F.2d 1325, 1333 (9th Cir. 1978) (en banc) (Standard of prejudice "does not mean" that the reviewing court must weigh the evidence for itself and conclude that "the defendant would have been acquitted but for counsel's blunders.") One (the Tenth) places a "harmless beyond a reasonable doubt" burden on the State. United States v. Payne, 641 F.2d 866, 867-68 (10th Cir. 1981). Two circuits (the Sixth and Seventh) place the burden on the accused to show that counsel's ineffectiveness "deprive[d] . . . [him] of a substantial defense," Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974), or engendered some "specific loss." United States ex rel Ortiz v. Sielaff, 542 F.2d 377, 380 (7th Cir. 1976). Two circuits (the Third and Eighth), hold that the accused must first demonstrate that, but for counsel's ineffectiveness, the proceedings before the trier of fact would have been materially different in a way "helpful" or "beneficial" to the accused; then, once the accused meets this burden, the burden shifts to the State to show that

(Footnote continued on next page)

the court of appeals reasoned as follows:

"First, in cases where the allegation of ineffective assistance is based upon counsel's failure to raise certain objections, the Decoster test requires the petitioner to carry a burden of showing prejudice that is different from and greater than the analogous burden in the "cause and prejudice" formulation of Wainwright v. Sykes, 433 U.S. 72, 87, 97 S.Ct. 2497, 2506, 53 L.Ed. 2d 594 (1977). Application of the Decoster rule may thus have the surprising result of holding a petitioner who has established a deprivation of his constitutional right to effective assistance of counsel to a greater showing of prejudice than if he was merely trying to present a claim of constitutional error not raised in the state courts." (App. 71) (emphasis added).

Finally, the court adopted a test of prejudice that had been articulated by this Court as recently as last term in United States v. Frady, *supra*. The court of appeals reasoned that this standard, which requires a habeas petitioner to "show that ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of his defense," (App. 75), would effectively accommodate the interests of the habeas petitioner and the State.

(Footnote 12 continued)

Counsel's ineffectiveness was harmless beyond a reasonable doubt. Third Circuit: United States ex rel. Green v. Rundle, 434 F.2d 1112, 1113 (3rd Cir. 1970) (emphasis added) (initial prejudice burden is on the accused to show that "the missing evidence [not presented due to counsel's ineffectiveness] would be helpful"); United States ex rel. Johnson v. Johnson, 531 F.2d 169, 177 (3rd Cir. 1976) (once the accused meets the initial burden, the state may avoid relief by showing that the breach of duty was "harmless beyond a reasonable doubt"); Eighth Circuit: McQueen v. Swenson, 498 F.2d 207, 220 (8th Cir. 1974) (emphasis added) ("the petitioner must shoulder an initial burden of showing the existence of admissible evidence which could have been uncovered by reasonable investigation and which would have proved helpful to the defendant Once this showing is made, a new trial is warranted unless [the State proves] . . . such evidence was harmless beyond a reasonable doubt." While the remaining circuit (the Second) utilizes a standard akin to the outcome determinative text, LiPuma v. Commissioner Department of Corrections, 560 F.2d 84, 92 (2d Cir. 1977), that is attributable to the Circuit's anachronistic retention of the "farce and mockery" standard for assessing counsel's performance. See, e.g., United States v. Williams, 575 F.2d 388, 393 (2d Cir. 1978).

"This burden is of sufficient magnitude to discourage the filing of insubstantial claims and to focus the attention of the district court on the actual harm suffered by the petitioner as a result of his counsel's performance. At the same time, the burden does not require the petitioner to produce evidence to which he is unlikely to have access. It also properly reserves for the state the ultimate burden of showing that any constitutional error that did occur was harmless beyond a reasonable doubt." (App. 73-76).

In sum, the decision of the en banc court of appeals relies exclusively and explicitly upon precedent of this Court so that any claim of inconsistency is wholly belied by a careful review of the court of appeals' opinion. Moreover, the standard adopted by the en banc court is consistent with, and more stringent than, that of every other federal circuit, with the exception of the anomalous decision of the District of Columbia Circuit in United States v. DeCoster, *supra* (see note 12, *supra*). Finally, as the en banc majority explained, it is DeCoster, not the case at bar, that is inconsistent with this Court's prior decisions for it "requires the petitioner to carry a burden of showing prejudice that is different from and greater than the analogous burden in the 'cause and prejudice' formulation of Wainwright v. Sykes [citation omitted]." Under these circumstances, certiorari should be denied, since the court of appeals has correctly reasoned and appropriately decided the constitutional issues in the case at bar.

CONCLUSION

For the reasons mentioned above, the petition for writ of certiorari should be denied.

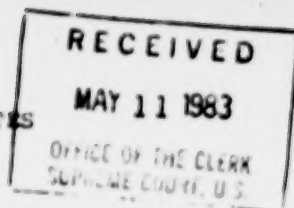

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(609) 292-1693

Dated: May 9, 1983

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1982

NO. 82-1554



CHARLES E. STRICKLAND, SUPERINTENDENT
FLORIDA STATE PRISON; JIM SMITH, ATTORNEY
GENERAL OF FLORIDA, AND LOUIS L. WAINWRIGHT,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Petitioners,

-VS-

DAVID LEROY WASHINGTON,

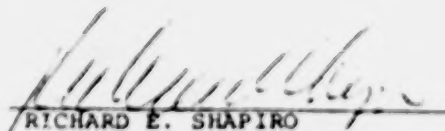
Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The respondent, David Leroy Washington, who is presently incarcerated in Florida State Prison, Starke, Florida, requests leave to file the attached Respondent's Brief In Opposition without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

Respondent was granted leave to proceed in forma pauperis in the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Fifth Circuit (Unit B).

Counsel has mailed, but has not yet received, the completed affidavit from respondent in support of this motion. As soon as counsel receives this affidavit, he will forward it immediately to the Court.


RICHARD E. SHAPIRO

CN-850
Trenton, New Jersey 08625
(609) 292-1693

Dated: May 9, 1983

APR 22 1983

ALEXANDER L. STEVAS,
CLERK

No. 82-1554

In The
Supreme Court of the United States
October Term, 1982

CHARLES E. STRICKLAND, SUPERINTENDENT FLORIDA STATE
PRISON; JIM SMITH, ATTORNEY GENERAL OF FLORIDA, AND
LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT
OF CORRECTIONS,

Petitioners,

vs.

DAVID LEROY WASHINGTON,

Respondent.

On Writ of Certiorari To The United States Court of Appeals
For The Former Fifth Circuit (Unit B)

BRIEF AMICI CURIAE OF THE STATES OF ALABAMA, Ar-
IZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNEC-
TICUT, DELAWARE, GEORGIA, HAWAII, IDAHO, ILLINOIS,
INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE,
MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI,
MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW
JERSEY, NEW MEXICO, NORTH CAROLINA, OHIO, OKLA-
HOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA,
SOUTH DAKOTA, TEXAS, UTAH, VERMONT, VIRGINIA, WASH-
INGTON, WEST VIRGINIA, AND WYOMING, IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR AMICI CURIAE

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INGTON, WEST VIRGINIA, AND WYOMING, IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

The States noted above, by and through their respec-
tive Attorneys General (see Appendix), appear on behalf
of their citizens and file this brief pursuant to Rule 36 of
the Rules of this Court.

INTEREST OF AMICI CURIAE

As the chief legal officers of their respective states,
these Attorneys General are often called upon to represent

the correctional administrators of their states in federal courts in habeas corpus actions initiated pursuant to 28 U. S. C. § 2254. Moreover, Attorneys General have a vital interest in the integrity of the criminal justice process of their states. With ever-increasing frequency they are required to defend state criminal convictions against Sixth and Fourteenth Amendment allegations of ineffective assistance of counsel. For these reasons, the amici have a substantial and continuing interest in the establishment of consistent standards for application in cases involving claims of ineffective assistance of counsel.

SUMMARY OF ARGUMENT

The issue of ineffective assistance of counsel can potentially be raised in every criminal case in which a conviction is obtained. Absent a controlling decision from this Court, the standards by which such claims are presently reviewed in state and federal courts vary from state to state and from circuit to circuit. No other issue so pervasively threatens our courts' ability to enforce criminal sanctions on such a fundamental level. There is a vital and immediate need for this Court to resolve the conflicts that presently exist among the states and the federal circuits and establish guidelines by which courts can begin to analyze these claims with a measure of consistency.

ARGUMENT

This Court should resolve the direct conflict between an *en banc* decision of the Eleventh Circuit Court of Appeals, on the one hand, and the decisions of the D. C. Circuit Court of Appeals, sitting *en banc*, and the Florida Supreme Court, on the other. The Eleventh Circuit, in *Washington v. Strickland*, 693 F.2d 1243, 1261 (5th Cir. 1982) (Unit B) (Former Fifth) (*en banc*) expressly rejected the reasoning of the D. C. Circuit in *United States v. DeCoster*, 624 F.2d 196 (D. C. Cir. 1979) (*en banc*) and "[struck] down the Florida Supreme Court's standard for reviewing ineffective assistance of counsel claims set forth in *Knight v. State*, 394 So.2d 997 (Fla. 1981)." 693 F.2d at 1287. The issue raised by this conflict is related to, but goes further than that recently addressed by Justice White in *Romero v. United States*, 103 S.Ct. 236, 237 (1982) (*cert. denied*) (White, J., dissenting). He said of the effectiveness of counsel that "[a] more fundamental question to the administration of criminal justice in the state and federal courts can scarcely be envisioned." *See also, Maryland v. Marzullo*, 435 U.S. 1011 (1978) (White, J., joined by Rehnquist, J., dissenting from the denial of *certiorari*).

While all Circuit Courts of Appeal, with the sole exception of the Second Circuit, have adopted a "reasonable competence" standard of effectiveness, or some variation thereof, the analysis by which the standard is to be applied varies dramatically. Other circuits have adopted and applied similar analysis to that established in *DeCoster*, *supra*. *See, Cooper v. Fitzharris*, 586 F.2d 1325 (9th Cir. 1978) (*en banc cert. denied*, 440 U.S. 974 (1979);

White Hawk v. Solem, 693 F.2d 825, 827 (8th Cir. 1982); *Wade v. Franzen*, 678 F.2d 56 (7th Cir. 1982). Compare, *United States v. Porterfield*, 624 F.2d 122 (10th Cir. 1980); *United States v. Payne*, 641 F.2d 866 (10th Cir. 1981). The D. C. Circuit continues to apply the *DeCoster* analysis. See, *United States v. Green*, 680 F.2d 183, 184 (D. C. Cir. 1982). A number of state courts have cited *DeCoster* with approval and adopted modes of analysis similar to that employed by the D. C. Circuit. See, e.g., *True v. State*, Decision No. 3169, slip op. at 9 (Me. March 9, 1983); *Davis v. State, Ind. App.*, 418 N.E.2d 256, 267, n. 7 (1981); *State v. Hyman*, S. C., 281 S.E.2d 209, 213 (1981); *Lang v. Murch*, Me., 438 A.2d 914, 916 (1981). Other state courts have applied varied standards to these claims, standards threatened by the emerging significance of the issue and the increasing frequency with which Circuit Courts are called upon to review it. For example, in *People v. Fosselman*, Crim. 22474, slip op. at 15 (Cal. March 17, 1983), the California Supreme Court recently held that "a defendant may prove . . . ineffectiveness if he establishes that his counsel failed to perform with reasonable competence and that it is *reasonably probable a determination more favorable to the defendant would have resulted in the absence of counsel's failings.*" (Emphasis added.) See also, *State v. LePage*, Idaho, 630 P.2d 674, 680 (1981); *Commonwealth v. Borelli*, Pa. Super., 431 A.2d 1067 (1981).

This Court's central responsibility as the court of last resort requires that it eventually resolve these fundamental conflicts. The integrity of our criminal justice process hangs in the balance. Each day that passes under the conflicting rules and varied burdens of proof currently being applied results in more criminal convictions in

which the claim will eventually be raised and decided amidst a confusing amalgam of case law. The problem is pervasive and the issue complex. As a result, the need to establish a consistent standard of review is immediate.

CONCLUSION

For the foregoing reasons we urge this Court to grant certiorari and review the opinion and judgment of the court below.

Respectfully submitted this 20th day of April, 1983.

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ALEXANDER L. STEVAS,
CLERK

NO. 82-1554

IN THE

Supreme Court of the United States

October Term, 1982

CHARLES E. STRICKLAND,
Superintendent
Florida State Prison;
JIM SMITH, Attorney General
of Florida, and LOUIE L. WAINWRIGHT
Secretary, Florida Department
of Corrections,

Petitioners,

vs.

DAVID LEROY WASHINGTON,
Respondent.

On Writ of Certiorari
to the United States
Court of Appeals for the
11th. Circuit
"Former Fifth Circuit (Unit B)"

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. WHETHER THE ELEVENTH CIRCUIT CORRECTLY REVERSED THE DENIAL OF THE RESPONDENT'S HABEAS CORPUS APPLICATION WHILE FAILING TO CONSIDER OR APPLY THE PRESUMPTIVE VALIDITY AND FACTUAL FINDINGS OF FOUR STATE COURTS AND THE DISTRICT COURT?

2. WHETHER THE ELEVENTH CIRCUIT IN OVERRULING THE SUPREME COURT OF FLORIDA AND REJECTING THE EN BANC OPINION OF ANOTHER COURT OF APPEALS, HAS APPLIED THE CORRECT STANDARD FOR REVIEW OF CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL?

3. WHETHER THE ELEVENTH CIRCUIT HAS PROPERLY APPLIED UNITED STATES V. FRADY, ___ U.S. ___, 102 S.CT. 1584 (1982) AND THE STANDARD FOR THE DEGREE OF PROOF AND THE BURDEN OF PROOF REQUIRED IN COLLATERAL PROCEEDINGS?

4. WHETHER DEFENSE COUNSEL PROVIDED "CONSTITUTIONALLY ADEQUATE REPRESENTATION."

QUESTIONS PRESENTED
CONTINUED

5. WHETHER THE COURT OF APPEALS HAS MISAPPLIED FAYERWEATHER V. RITCH, 195 U.S. 276 (1904) TO EXCLUDE A STATE TRIAL JUDGES TESTIMONY OR WHETHER THAT DECISION SHOULD BE OVERRULED OR LIMITED, WHERE THE STATE TRIAL JUDGE TESTIFIES AS AN EXPERT AND AS THE PRESIDING JUDGE, THAT THE NEW EVIDENCE OFFERED BY THE DEFENDANT WOULD MAKE NO DIFFERENCE UPON THE IMPOSITION OF THE DEFENDANT'S SENTENCE?

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PREFACE

The following references are made herein:

(A) For the "Appendix of Petitioner on Jurisdiction," consisting of pages A1-A324.

(TR) For the original transcript-of-record-on-appeal in Washington v. State, 362 So.2d 658 (Fla. 1978) consisting of pages TR1-TR636.

(R) For the U.S.D.C record on appeal consisting of exhibits and pages R1-R103.

(T) For the habeas corpus evidentiary hearing, consisting of pages T1-T198.

(JA) For the Joint Appendix which contains inter alia: the original transcript on appeal. The U.S. District Court transcript; all psychiatric reports and the Defendant's Rule 3.850 exhibits, and consists of pages JA1-JA510.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, is reported at Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982)(Unit B)(Former Fifth)(en banc) (A1-A206). The opinion of the United States District Court for the Southern District of Florida is printed at A252-A295 and is presently unreported.

The opinion of the Supreme Court of Florida is reported at Washington v. State, 397 So.2d 285 (Fla. 1981)(A244-252). The opinion of the Florida trial court is printed at A206-A252 and is unreported.

JURISDICTION

On December 23, 1982, the United States Court of Appeals for the Eleventh Circuit, sitting en banc reversed and remanded the United States District Court's denial of the Defendant's Petition for a Writ of Habeas Corpus¹. Neither the State nor the Defendant filed a motion for a rehearing.

The jurisdiction of this Honorable Court is invoked pursuant to the specific provisions of Rule 17 of the Rules of the Supreme Court; Title 28 U.S.C. §1254(1) and Amendments VI and XIV of the United States Constitution.

¹The Respondent will be referred to herein as "the Defendant" and the Petitioners will be referred to as "the State."

privileges or immunities of citizens of the United States; nor shall any state deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Title 28 U.S.C. §2254(a) provides that:

"The Supreme Court, a justice thereof, a circuit judge or a District Court shall entertain an application for a Writ of Habeas Corpus in behalf of a person in custody pursuant to the judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

Title 28 U.S.C. §2245 provides inter alia, that:

"On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence."

STATEMENT OF THE CASE

Relevant to this proceeding, the Defendant confessed, plead guilty and was convicted of three counts of first degree murder and sentenced to death for each conviction by the Florida State trial court. Washington v. State, 362 So.2d 658 (Fla. 1978), cert. den. 441 U.S. 937 (1979). The Defendant was also simultaneously convicted of numerous other serious offenses. Id. The three criminal episodes resulting in the Defendant's convictions are succinctly described in Washington v. State, to wit:

"These appeals arise out of a series of murders committed by appellant during a twelve-day period. On September 20, 1976, appellant and an accomplice formulated a plan to rob and kill Daniel Pridgen. The purported motive for the killing was the fact that Pridgen, a minister, was a homosexual and in appellant's opinion a man of the cloth violated religious and moral precepts by

engaging in homosexual activities. According to the plan, appellant's accomplice was to induce Pridgen to engage in homosexual activities. When Pridgen was undressed and in bed, the accomplice was to cough two times as a sign for appellant to enter the home and kill Pridgen. Appellant entered the Pridgen home when the signal was given and while the accomplice covered Pridgen's face with a pillow and held him helpless, appellant stabbed the victim to death. Appellant and his accomplice stole certain items from Pridgen's home, attempted to wipe their fingerprints from surfaces about the house, and fled." Id., at 660.

The "Birk" murder three days later is detailed thus:

Appellant carried a rope, a knife and a gun with him to the residence. By appellant's admission, the gun was loaded. Having arrived in the area of the home, appellant concealed himself outside of the residence and kept the home under surveillance for some period of time. Appellant waited until he was relatively certain that the occupants of the home, Mrs. Birk and her three sisters-in-law, were together in one room. Once this occurred,

appellant cut the screen on the Birks' front door and entered the residence. Appellant disguised himself by tying a rag around a portion of his face. Appellant instructed the four occupants to lie on the floor. Two of the women complied with appellant's demand, and appellant permitted one woman to seat herself in a chair. Mrs. Birk went into the kitchen and obtained a box containing money, which she offered to appellant. At this point, appellant cut the telephone cord and proceeded to tie up the four women. As appellant was completing this task, he observed Mrs. Birk inching her way into the kitchen. An argument ensued between the two, and appellant shot Mrs. Birk in the head and repeatedly stabbed her with his knife, causing her death. Appellant thereafter approached his bound victims, shooting each in the head and inflicting several stab wounds. Appellant then fled to his home, carrying the money box. After arriving at his home, appellant counted the stolen money and disposed of the knife and the money container. Each of the sisters-in-law survived the assault. However, one women became blind in one eye, one suffers breathing difficulties

due to the knife wounds to her lungs, and one remains in a comatose, vegetable state.[²] Id. at 660-661.

The third murder of "Frank Meli" which is progressively more brutal, is described thus:

"On approximately September 27, 1976, appellant contacted his third victim, Frank Meli, by telephone in response to the latter's newspaper advertisement for the sale of an automobile. After briefly conferring with Meli, appellant terminated the telephone conversation. The following morning, appellant again called the Meli residence and arranged to meet Meli at a particular intersection for a test drive of the vehicle. Following the test drive, appellant persuaded Meli to go to appellant's home to obtain the money to conclude the sale. Upon Meli's entry into appellant's home, appellant brandished a knife and forcibly bound his victim to a bed. Two of appellant's companions assisted appellant in guarding Meli to prevent an escape. Appellant

²The "comatose" victim subsequently also died. See, Washington v. Strickland, 693 F.2d 1243, at 1247, n. 1 (5th Cir. 1982)(A91).

succeeded in selling Meli's automobile and then forced Meli to telephone his family and request a ransom.

On the morning of September 29, 1976, appellant paid his companions part of the proceeds from the sale of the automobile for their assistance in holding Meli captive. Appellant's friends left the residence and appellant entered the bedroom where Meli had been tied spreadeagled to a bed. The testimony at this point is conflicting. Appellant stated in his subsequent written confession to police that Meli had untied one of the four straps securing him to a bed and a struggle ensued. It is uncontested, however, the appellant stabbed Meli eleven times. During the stabbing, appellant's companion entered the bedroom and covered Meli's face with a pillow to prevent others from hearing the victim's screams. When appellant and his companion left the room a few minutes later, Meli was fatally wounded but still alive. Before leaving, appellant secured Meli's bonds and gagged him. Appellant then proceeded to an intersection where he had arranged to meet Meli's brother and obtain the ransom money. After loitering in the area for several minutes,

appellant observed what he believed to be police officers on a stake-out. Reaching the conclusion that Meli's brother had contacted the police, appellant left the area and returned home. Appellant reentered the bedroom in which Meli was being held and found is hostage dead. Appellant then dug a shallow grave in his backyard and buried his victim's body." Id. at 661.

The Defendant was subsequently apprehended when the police were closing in on the "Meli" investigation. Id. at 661-662. He then proceeded to confess to all three killings. Id. The Defendant's confessions are contained in the Florida trial record at TR459-TR474 (Pridgen killing); TR486-TR519 (Birk killing); TR528-TR552 (Meli killing).

The Defendant was indicted on October 7, 1976 for the murder of Meli. (TR238) and on November 18, 1976 for the murder of Birk and Pridgen (TR242-TR248). The Defendant pleaded guilty to all

charges and a subsequent escape charge on December 1, 1976. See, TR254; Id. at 661-662.

Relative to this appeal, the Defendant carefully explained to the Florida trial court that the decision to plead guilty was entirely the Defendant's idea and was contrary to his defense counsel's advice:

"THE COURT: . . . Are you satisfied with the way he worked your case?

"THE DEFENDANT: I want to say this. I think this is about one of the best lawyers you could ever get. But for the crimes I feel I was 100 percent--I was guilty. I would have gave up. I believe I would have got with my wife and I would have come forth with the evidence anyway. He didn't have no grounds to fight it on. I don't believe in telling no lies. You understand what I am saying?

THE COURT: As an officer of the court, it is his responsibility to take the legal steps necessary for the protection of his client's interests.

"THE DEFENDANT: I understand.

"THE COURT: Do you understand that by pleading guilty you, in fact, stop that work that he is going and those steps that he may have made be they technical or otherwise. Now he is foreclosed from doing them.

"THE DEFENDANT: Yes, sir. I understand. I want to say this. Like I say, you can't get a better lawyer. He didn't have any grounds to fight on because I gave a confession.

"THE COURT: He made himself available at the time you wanted to see him.

"THE DEFENDANT: He was there. He was always there.

"THE COURT: You have no reason to indicate to me anything other than you would have me appoint him on another case?

"THE DEFENDANT: I tell you this, if it was left up to him, he would fight this to the Supreme Court. But, I told him I would rather go ahead and plead because it don't make sense to try to hide it when I know I'm guilty." [Emphasis added].
JA54-JA56.

In the few weeks prior to the Defendant's plea, defense counsel invoked reciprocal discovery, TR251; filed a written demand for specific discovery, TR259-TR266; filed two Motions to Dismiss the indictments and death penalty as unconstitutional, TR261-TR265; TR364-TR368 and a Motion to Suppress Defendant's Confessions Admissions and Statements, TR369. The State's response to the Defendant's demand for discovery lists seventy-eight (78) witnesses and numerous other discovery exhibits and informations. TR272-TR279. Defense counsel furthermore adopted all the various motions filed by co-defendants Taylor and Mills³. See, TR324, TR252. Mills and Taylor also filed various Motions to Suppress, Demands for

³The co-defendants' subsequent convictions are reported at Mills v. State, 407 So.2d 218 (Fla. 3d DCA 1981) and Taylor v. State, 386 So.2d 825 (Fla. 3d DCA 1980).

Discovery and Motions directed toward the indictment. Relative to this proceeding the trial court ascertained that the Defendant was not pleading guilty in order to avoid the death penalty, and the trial court noted that it had made no determinations whatsoever as to what penalty to apply:

"THE COURT: You may just as well get the death penalty from me as not. I will follow the law. I am not one of those judges that will automatically not give the death penalty. Do you understand that?

"THE DEFENDANT: I do.

"THE COURT: . . . I don't want you ever coming back here, if in fact it should be determined that I find the aggravating circumstances outweigh the mitigating circumstances and sentence you to death, and hear Mr. Tunkey or Pollock say somebody told you that was not what I was going to do.

"THE DEFENDANT: Yes, sir. I understand.

"THE COURT: Has anybody told you there was any deal involved in my court?

"THE DEFENDANT: No, sir.

THE COURT: I would sure like you to tell me if there was.

"THE DEFENDANT: I would like to say this. I believe the crime fits the punishment and I don't want to die. You understand what I am saying, but I say if I got to sit up in some jail and rot I would rather get the chair.

"THE COURT: We will resolve the question of punishment. I want you to be satisfied that I have a great deal of respect for people who are willing to step forward and admit their responsibility. That is not an automatic key to the door nor is it anything else.

We will have a hearing on what the evidence is, but I do not want you to be laboring under some pretense that is false that I let my feelings be known as to what sentence I would give in this case.

The only conversation I have had with these two lawyers is whether or not I would hear this case without a jury and I told everybody I would hear every case without a

jury as long as both sides waive that right. I am not afraid of the case. I want you to understand that that is the extent of my involvement.

Have you any information that would lead you to believe that there has been anything more than that?

"THE DEFENDANT: No. I haven't.

"MR. TUNKEY: I can put on the record--I am sure he will agree with me- that if anything I told him there is absolutely no guarantee as to what sentence; that it would be consecutive life terms with no parole, or he could face the electric chair on each one. I told him I do not have any information concerning what the sentence might be.

As far as that area of the question ing, that has been our conversation on numerous occasions." [Emphasis added]. JA61-JA64.

Subsequently, on December 6, 1976, the Florida State trial court conducted a sentencing proceeding. See, JA79-JA331. The State produced ten (10) witnesses and fifteen (15) exhibits setting forth the crimes, including the Defendant's confessions, which were recounted in their

entirety at the penalty proceedings.

See, JA124-JA139 (Pridgen killing);

JA124-JA139 (Birk killing); JA261-JA278

(Meli killing). The State's other

evidence and witnesses merely

corroborated the details of the killings

as graphically portrayed in the

Defendant's confessions. Officer Charles

Major discussed his investigation of the

Pridgen murder and the Defendant's

confession. JA103-JA154. Officer Major

testified that the Defendant had in-

tended to kill Pridgen at all times.

JA124-JA125. Medical examiner Elidio

Fernandez, testified as to the autopsy of

Pridgen. JA154-JA161.

Ruth Pitzer was a surviving victim

in the Birk killing and testified as to

the events during and after the Birk

killing. JA162-JA175. Similarly, Julia

Sullivan, who was also a victim, also

recounted the Birk killing. JA176-JA184.

Officer David Simmons explained his investigation of the Birk killing and the Defendant's confession. JA184-JA223. The Defendant told Officer Simmons that when Birk attempted to resist the robbery, he stabbed and shot her and then did the same to the other three women who had witnessed the Birk killing. JA214-JA216. Dr. Hubert L. Rosonoff testified that one of the other victims of the Birk killing was still comatose from the brutal attack of the Defendant. JA224-JA228; but see, n. 2, supra. Officer John Spiegel testified as to his investigation of the Meli murder; his observations of the Defendant when the Defendant appeared at a "drop" site to pick up the ransom money for Meli and the fact that the police had traced the Defendant to the scene of the Meli killing when the Defendant surrendered. JA236-JA251. Detective Charles Zatrepaletk testified as to the

Defendant's surrender and confession to the Meli killing. JA253-JA286. Detective Zatrepaek testified specifically that the Defendant intended to kill Meli at all times. JA284-JA285. The witness, Harry Coleman, corroborated the Defendant's statement in his confession that the Defendant had used the proceeds from the Meli killing to buy a motorcycle. JA287-JA288. Medical Examiner Wright was also recalled and testified as to the removal of Meli's body from a shallow grave, which was described in the Defendant's confession. JA294-JA310. He also testified as to the eleven stab wounds to the body of Meli and the ligatures still attached to the body, which the Defendant had indicated were used to tie Meli to the bed where he was murdered. Id.

In the Florida trial court, defense counsel argued vigorously that four of

the statutory aggravating circumstances under Section 921.144, Fla.Stat. clearly did not apply and that statutory mitigating circumstances did apply under subsections (a) and (b), relating to the fact that the Defendant had no history of criminal activity and that the Defendant committed the murders while under extreme mental or emotional disturbance. See, JA332-JA336. Defense counsel also argued that the trial court should consider as non-statutory mitigation that the Defendant surrendered to the police; confessed to his crimes and offered to testify against a co-defendant, Mills. Id. At the sentencing hearing itself, defense counsel made an impassioned plea to spare the Defendant's life because the death penalty is immoral; because the Defendant is basically a good person and because the Defendant could serve out his years in prison. See, JA320-JA324.

Finally, it should be noted defense counsel successfully excluded the Defendant's "rap sheet". JA311-JA312.

The Florida state trial court in a detailed order sentenced the Defendant to three (3) consecutive death sentences upon a finding that there were insufficient mitigating circumstances and that ample aggravating circumstances were present in that all three murders, 1) were heinous, atrocious and cruel; 2) were committed while engaged in a violent felony and were plainly for pecuniary gain and 3) were committed to avoid arrest and to hinder the enforcement of the laws of Florida. See, §921.141(6)(d)(e)(f)(g) and (h)(1975); 362 So.2d at 662-664. The trial court additionally found that the murder of Birk was committed in such a manner that it created danger to many persons. §921.141

(5)(c); Id. On September 9, 1978, the Florida Supreme Court concurred in the trial court's views and found that there were no mitigating circumstances. 362 So.2d at 665-667. The Defendant, represented by counsel, applied to this Court for review, which was refused on April 30, 1979. Washington v. Florida, 441 U.S. 937 (1979).

On September 18, 1980, subsequent to clemency proceedings, the Defendant filed his Motions in the Florida state trial court for collateral relief under Rule 3.850 Florida Rules of Criminal Procedure claiming inter alia that his counsel was ineffective. See Exhibits, U.S.D.Ct. record. After the Defendant neglected to pursue his Rule 3.850 motion, on March 13, 1981 Governor Robert Graham of Florida signed a death warrant commanding that the Defendant be executed sometime between April 3, 1981 and noon on April

10, 1981. On March 27, 1981 after argument upon the Defendant's motion the Florida trial court entered a detailed written order relying upon the watershed opinion in Knight v. State, 394 So.2d 997 (Fla. 1981)⁴. See, A206-A243. Specifically the state trial court found that the affidavits presented little more information than the Defendant presented himself at the plea colloquy. A225. The state trial court also found that the psychiatric reports presented by the

⁴Knight set four-step process by which a defendant's claim of ineffective assistance of counsel should be examined:

"In determining whether defendant has been provided with reasonably effective assistance of counsel, we believed the following four-step process encompassed in United States v. DeCoster (DeCoster III), 624 F.2d 196 (D.C. Cir. 1979) (en banc), provides a means to discover a true miscarriage of justice and yet does not place the judiciary in the role interfering with defense counsel's legal and tactical conduct at trial or on appeal. We adopt the following four principles as a standard to whether an attorney has

Defendant also would have clearly established elements of the aggravating circumstances which the State was required

(Footnote 4 cont.) provided reasonably effective assistance of counsel to his client.

"First, the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading."

"Second, the defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel. As was explained by Judge Leventhal in DeCoster III: 'to be 'below average' is not enough, for that is self evidently the case half the time. The standard of shortfall is necessarily subjective, but it cannot be established merely by showing that counsel's acts of omissions deviated from a checklist of standards.' 624 F.2d at 215. We recognize that in applying this standard, death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstances."

"Third, the defendant has the burden to show that this specific serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court

to prove in order to impose the death penalty. Id. Additionally, the witnesses who submitted affidavits were apparently also unaware that the Defendant did have a substantial criminal history. See, A225; JA338-JA365.

On appeal to the Supreme Court of Florida, the Court also rejected the Defendant's claims relying upon Knight v. State, opining inter alia that:

(Footnote 4 cont.) proceedings. In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome not simply harmless error. This requirement that a defendant has the burden to show prejudice is the rule in the majority of other jurisdictions."

"Fourth, in the event a defendant does show substantial deficiency and presents a prima facie showing of prejudice, the state still has an opportunity to rebut these assertions by showing beyond a reasonable doubt that there was no prejudice in fact. This opportunity to rebut applies even if a constitutional violation has been established. Chapman v. California, 386 U.S. 18 (1967); DeCoster III." [Emphasis added, footnote omitted]. 394 So.2d at 1000-1001.

"To each of appellant's initial six points, the state counters with arguments that the omissions were not substantial. But even more fatal, we can find no prejudice caused to appellant, even if we assume that every allegation he has made in his petition is true. Several contentions focus on the lack of proof of appellant's good character and his emotional and economic stress just prior to the murders. But equivalent proof was indeed placed before the sentencing court by Washington himself in the guilty plea colloquy, in which he attested to his troubles and that this was his first encounter with the law, all without being subjected to cross-examination. Nor was trial counsel's failure to obtain or request a psychiatric evaluations conducted before and after sentencing failed to raise any evidence of significant mental disturbance or impairment. None of these reports raise any substantial legal or factual arguments in mitigation, and hence there could be no prejudice." 397 So.2d at 286-287.

The Florida Supreme Court concluded that, "the appellant has failed under the Knight criteria to make a prima facie showing of substantial deficiency or possible prejudice and has failed to such a degree that we believe to the point of

moral certainty, that he is entitled to
no relief. . ." [Emphasis added]. Id.

Specifically, with respect to the representation of counsel, the Florida Supreme Court observed that even the most zealous advocate could not have saved the Defendant from his fate:

"The record shows that trial counsel made a respectable argument on appellant's behalf at the sentencing hearing. A confession plus numerous aggravating factors limit the alternatives of the most zealous of advocates." Id.

In the present case, the Defendant had prefiled his petition for habeas corpus in U.S. District Court on April 3, 1981. R1-R12. The Defendant's habeas petition however omitted all of the exhibits which were attached to his Rule 3.850 Petition in State Court ⁵. On

⁵The Defendant's exhibits 2 through 15 are affidavits of friends and neighbors and members of the Defendant's family,

April 7, 1981, pursuant to oral argument the U.S. District Court entered a stay pending further consideration and on April 10, 1981, the U.S. District Court over vigorous State objection conducted an evidentiary hearing. JA367-JA370.

At the evidentiary hearing below, the District Court directed that the Defendant should particularly direct his attention to a showing of prejudice. T5. The Defendant produced only one witness, his trial court counsel, Bill Tunkey.

(Footnote 5 cont.) which say that the Defendant was basically a good person and had never been in trouble with the law. See, Exhibits, U.S.D.Ct. record (JA338-JA365). Defendant's other affidavits, 16 and 17, were affidavits of a psychiatrist, Bernard, and a psychologist, Lane, who conclude that the Defendant was sane and competent at the time of the crimes and is sane and competent now. Id. (JA6-JA15). The State filed these exhibits together with the original record and other matters. The District Court accepted them as evidence without objection, See, R21-R22; JA438-JA439, and subsequently noted them in its analysis, A266-A267.

See, T2. Mr. Tunkey testified that he represented the Defendant initially on the Meli killing beginning in early October of 1976. JA372. He testified that he had been in the practice of law, and exclusively criminal law, for six and one half years prior to his appointment to represent the Defendant. JA422-JA423. He said that he began his career as a prosecutor in 1970 and entered private practice in 1973. Id. Tunkey testified that he was the trial attorney in perhaps over a thousand (1000) cases during that time (JA424) and that prior to the present case, he had been a court-appointed attorney, on over one hundred (100) cases (JA423).

In the present case, Mr. Tunkey testified that his fundamental strategy was to dilute the State's case and that he did consider in his preparation, the aggravating and mitigating circumstances

that were possible. JA374-JA377. He testified that the prosecutor permitted open file discovery:

"[By Mr. Shapiro]: Q: How was your investigation conducted at this time?

"[By Bill Tunkey]" A: Well, it was conducted primarily through the State and by that I mean the State Attorney's office was having an almost open file discovery in the Meli case and certainly when the Pridgen and the Birk's case came to pass, they were providing literally open file discovery and by that I mean police reports, which in a normal case if I asked for the, I would not probably have gotten them.

"They were providing them and I was getting a complete list of witnesses and I was getting copies of all reports up until the time. . . up until I am going to say mid-November, using your date, there were active preparations being made by way of subpoenas to summon witnesses to attorneys, officers, either the Public Defender's office or the State Attorney's office, so that those witnesses might testify and give us a preview, so to speak, of what their testimony was going to be."[Emphasis added.]JA378-JA380.

Tunkey testified that he was ready to go to trial but that the State's case, in his experience, was overwhelming. JA425. He was also aware of the Defendant's prior felony record and testified that he discussed the Defendant's case with the Defendant for many hours. JA427-JA428. He was shocked when the Defendant confessed to the other murders:

"I was particularly surprised in light of the fact that I had counseled David and that it was possible that he might be approached by detectives and someone attempting to question him and when I discovered that he had almost initiated the contact with the detectives and had specifically on the record been advised that he had a right to have an attorney there and even mentioned the fact that he had a right to have me there by name, he waived those rights. . . [Emphasis added]. JA382-JA383,

Mr. Tunkey explained that the Defendant's choice to plead guilty was entirely

against his advice, but consistent with the Defendant's conduct regarding in the two subsequent confessions. JA387. He explained that the Defendant, against his best advice, had chosen to confess; to plead guilty and to waive any jury hearing on sentencing. JA399-JA401.

With respect to any issue of continuing the sentencing proceeding, Tunkey testified that the Defendant wanted to get it over with. T60. Tunkey tentatively testified that the Defendant did not want anyone at the sentencing proceeding. JA408. Tunkey explained that he had in fact, earlier in the case, requested a continuance of the Meli case because he did not want the Meli conviction to be used to enhance the penalty for the Birk and Pridgen murders (T32-T34), but that he saw no reason to continue the sentencing proceeding (T60). The

Defendant did not indicate any witnesses that he wanted for the sentencing phase. JA427-JA428. Prior to the Defendant's insistence on confessing and pleading guilty, Tunkey had endeavored to investigate the Defendant's background. JA387-JA390. As for example he explained that the Defendant's girlfriend or wife and his mother were repeatedly contacted, but never kept appointments to discuss the case. Id. Tunkey also said that he was aware of the Defendant's financial difficulties, but that the Defendant never mentioned any abuse as a child. Id.; JA428.

After the destruction of the case by his own client, Tunkey explained that, because of his personal familiarity with the trial judge that he believed that the central strategy for the Defendant in the grim posture of the case was to

personally demonstrate clear and genuine remorse, as non-statutory mitigation:

"Q: At that point in time, what was your strategy for the sentencing phase?

"A: Among other things and certainly one of the few things which I took into account as an attorney, which I can't say I discussed with David, but I took into account simply from the familiarity with the trial judge, Richard Fuller, was that he, being the trial judge, respected any individual who had been accused of a crime and who, in fact, was guilty of a crime and who came before him and admitted his guilt.

"To myself, I certainly thought if David had any chance at all, [and I am really getting subjective,] in front of this particular Judge, on these particular facts for these particular kind of crimes, that the one shot he perhaps had was the fact that he genuinely was coming before the Court and admitting his guilt, unlike some defendants who come in and plead guilty to avoid a harsher punishment.

"I really felt that Judge Fuller knew this was not such a ploy by Washington and based upon that and

my subjective analysis of Judge Fuller at that time at that stage of his career as a Judge, I felt that perhaps the strongest point that David had to save himself from the electric chair, and I can't say that this was fully discussed between David and I, but the thought went through my mind, keeping in mind the mitigating factors which the statute set forth at that time and some had already been put on the record as far as the testimony on December 1st is concerned from David himself, but I went through all of the aggravating and mitigating circumstances which the statute described and I was familiar with all the cases to that point that had been ruled upon the statute and various aspects of it, and I felt that one of the mitigating circumstances ought to be the fact that he was pleading guilty.

"I really could find very little to address myself to in terms of a relevant, cogent presentation of mitigating circumstances as outlined by the statute itself and certainly insofar as aggravating circumstances are concerned, I did not feel exactly like I had sufficient ammunition to persuade anybody that

the State was not going to succeed in showing at least that they outweighed the mitigating circumstances.

"I felt it was more of a legal argument at that point as far as the aggravating circumstances were concerned." [Emphasis added].JA401-JA404.

In view of the circumstances of the case, Tunkey considered that a showing of remorse was a critical factor:

"Q: Do you think that Judge Fuller would have been concerned about a defendant's remorse?

"A: Oh, yes, I think that was all part and parcel of David's attitude in court and also to me out of court. That is why I had the strong feeling that this was the most important thing he had going for him." JA407-JA408.

Mr. Tunkey also clearly explained that from his strategy standpoint, he firmly believed that the Defendant was the evidence of his own remorse and that family members would have been superfluous to the genuineness of the Defendant's

remorse, which he was trying to present and intimated that Judge Fuller may have reacted to such additional witnesses as "phony":

"[By Mr. Fox]: Q: Mr. Tunkey, why didn't you produce anyone from the defendant's family at the time of sentencing to demonstrate his remorse?

"A: First of all, I had trouble getting in touch with them, but assuming I could have gotten in touch with them, but the remorse that was shown, I assume it would have been shown in jail since he was not any place but jail from the day of his arrest until the sentencing of the 6th of December.

"I also thought it would have been superfluous because the remorse that David exhibited to me in court was of sufficient quality and quantity that it was obvious, to me anyway, and I thought to the trial Judge, that it was completely sincere, that it was not something that was phoned up, and if you will, to try to get a life sentence. In a rather ingenuous point at a hearing, I don't know which one, David expressed the thought that it probably be better to be sentenced to death than to rot in jail for the rest of his life.

"Now, regardless of whether that was a request for a death sentence which I don't think it was, but regardless of what connotation you give to that statement, the statement itself I thought showed the truthfulness, ingenuousness of the person, that he was really sincerely sorry for what he had done.

There were times that he, even though tears which is not on the record, exhibited his true remorse for what had occurred and I would certainly say that he was honestly remorseful for everything that he was charged with." [Emphasis added] JA429-JA430.

Tunkey affirmatively explained that he believed that there were also nothing from the Defendant's background, which would have swayed the Court from the aggravating circumstances. JA419. see also, JA432. To the contrary, Mr. Tunkey considered that the Defendant's background, as would have been revealed in a presentence investigation, would have been harmful to the Defendant. JA405-JA406. Similarly, Tunkey also explained that the presence of a psychiatric report was a two-edged sword

and that he considered and rejected the idea, because they would have only revealed that the crimes were for pecuniary gain. JA417-JA418; see, also, JA432-JA433. Mr. Tunkey specifically explained to the Court that the Defendant had expressed a clear understanding of the crimes and that the Defendant had indicated that the crimes were committed for pecuniary gain. JA415. Tunkey explained that based upon his extensive experience and knowledge of the case and communication with the Defendant, he did not believe a psychiatric report would therefore be helpful and that he felt he may have or may not have seen the report of Dr. Jacobson ⁶. Tunkey subsequently

⁶Dr. Jacobson's report was originally ordered and received by the magistrate, Judge John Tanksley, who first arraigned the Defendant. See, T190-T192. Dr. Jacobson's report indicates that there was no evidence of any psychosis on the

Tunkey subsequently examined the reports of Dr. Lane and Dr. Bernard⁷ and expressed the view that the reports indeed verified his own belief that the Defendant was sane and added nothing to mitigation in the case. T61-T63. The State called Mr. Tunkey as its own witness, when the Defendant failed to

(Footnote 6 cont.) part of the Defendant, and that there was nothing which would indicate that the Defendant was suffering from any major mental illness at the time of the offense. See, JA1-JA5; R21-R22; JA438.

⁷The reports of Doctor's Lane and Bernard were procured by the Defendant and submitted as exhibits 16 and 17 to his state motion to vacate. See, Exhibits (JA6-JA15); JA438-JA439. In Exhibit 16, Psychologist Lane states that he examined the Defendant on March 19, 1980, and found that there was no evidence to support the view that the defendant was legally insane or, psychiatrically-speaking, psychotic at the times of the crimes. JA13-JA14. The report of the Psychiatrist George W. Bernard states that he interviewed the Defendant on May 10, 1980 and he finds no indication of psychosis. Furthermore, he specifically states:

inquire as to the issue of cross-examination of medical examiners. Mr. Tunkey explained that he saw nothing to be gained and that vigorous cross-examination could very well have been devastating to the Defendant. T64-T65.

The State called Judge Richard S. Fuller as its witness. Judge Fuller testified as to his extensive qualifications and was accepted as an expert witness by the Court without objection. See, JA443-JA445. Judge Fuller testified that he appointed Mr. Tunkey on October 6, 1976 to represent the Defendant. JA446

(Footnote 7 cont.)

"It is my medical opinion that, at the time these capital felonies were committed, while [the Defendant] was not under the influence of extreme mental or emotional disturbance, he was chronically frustrated and depressed because of his economic dilemma wherein he was unable to find employment and provide for his wife and children." [Emphasis added]. JA7

Judge Fuller indicated that he was thoroughly familiar with Mr. Tunkey's qualifications and considered him to be among the better part of the criminal bar, with an impeccable reputation:

"Q: Did you have an opinion as to Mr. Tunkey's reputation then?

A: Bill Tunkey at that time and today has a reputation that I thought was impeccable. He worked hard. He did not ex parte judges, tried his cases as they should be tried and unlike other lawyers, did not argue unless he thought something was wrong or amiss. He was there when he was supposed to be and I wish I could have used him more. But obviously it would have not been proper." [Emphasis added]. JA446-JA448.

Judge Fuller testified, that the case had proceeded in a prompt and orderly fashion prior to the plea herein and that he had no reason whatsoever to question Mr. Tunkey's handling of the case. JA449.

With respect to the plea, Judge Fuller testified that in his experience and view of the case, the Defendant had

decided to plead guilty despite the efforts of his attorney. JA450-JA451. Judge Fuller specifically indicated that he had formed no opinion as to the penalty at that point. JA452. Judge Fuller testified that he was familiar with the Defendant's background and his employment and family problems. JA453. Fuller indicated that he conducted an extensive plea colloquy to be certain the Defendant knew the possible consequences of his plea. JA450-JA455. The sentencing proceeding was set to begin a few days later on December 6, 1976, which was not unusual and if anything was a little longer period after the plea than was normally the case. JA455. Judge Fuller testified that Mr. Tunkey's presentation in the sentencing proceeding, was effective. JA455-JA456. He said that Tunkey did nothing which was inconsistent with

what Judge Fuller thought should be done.

JA465. He indicated that the Defendant himself provided "in good part" the circumstances of his family background.

JA468. Finally, Judge Fuller testified that he wrote his own orders; that he had considered various non-statutory factors in mitigation, but that he would impose the same sentence today:

"[By Mr. Fox] Q: In your sentencing order, Judge, you find no statutory mitigation, but it states that there was insufficient mitigation. Can you explain that?

"A: As I remember the facts, Mr. Fox, of the enumerated group of mitigating circumstances, there were none and maybe my English wasn't appropriate because I wrote my own orders and I didn't ask the State Attorney to prepare these, I had considered his age, his family, the things he told me, his candor with the Court and I considered the authority, that his admission had been given and to me anybody that would get up in public and say they have done something wrong, gets a lot of stripes on his side.

"I think that is the first step and I was particularly pleased that he took this position, although not

enumerated by the Court, but it didn't add enough weight from the position where I thought I should be, to impose the death penalty which, of course, I did not get any pleasure from.

"It was an awful case. He was a very pleasant young man but after reviewing the record as I did last night, I would impose the same sentence today." JA458-JA460.

Judge Fuller explained that he had examined the Defendant's Rule 3.850 motion and its exhibits and even if the Defendant's witnesses were the best witnesses in the world their testimony would not and could not change his view that this is a death penalty case:

"A: . . . Were I to have the folks that were good enough to give affidavits before me in court and heard their testimony and it was consistent with the contents of their affidavits and were these people to have been the best witnesses that I have ever seen and were they to be the most believable people that I have ever seen and I assessed them as the best from a demeanor point of view and everything else, that information would not have changed my opinion then .

nor would it have changed my sentencing were I to give it today.

"Inasmuch as what David Washington told me himself at the time of his plea or at the time of the sentencing, the economic problems that he had, all about dollars and cents, problems with his family, perhaps problems with his step-father, most people who have found themselves in those circumstances, unfortunately have a rather depressing background.

"I recognized that and I had a great deal of thought about David Washington, but the extensive amount of circumstances in this case, and six that are of an aggravating nature just outweigh everything else and I don't think any other judge that had the same facts in front of him today or at the time would have made a different decision.

"I have labored over this and it is, in fact, correct if, in fact, there is a death penalty, then this is a death penalty case.

"[Mr. Fox]: No further questions."

JA461-JA463.

Judge further elucidated his answer on cross-examination:

"This is a capital case and I could put all those things in a great big thing in front of me, write them all down and do all kinds of stuff, but it comes out the same. He has got a terrible background. I felt terrible that people in our community have to live like he did. There were bad problems with his family, supporting his family, but that wasn't enough of a mitigating circumstance to the extent that it would outweigh the aggravating circumstances that I enumerated which must have been five or six in each case. These were heinous crimes." JA484.

On April 15, 1981, the United States District Court entered a twenty page order rejecting the Defendant's Petition for Writ of Habeas Corpus. See, A252-A295. Although the District Court was critical of defense counsel's tactical choice not to investigate certain aspects of the Defendant's background, the court did not conclude that defense counsel was ineffective.

See, A283, n. 3. To the contrary, the District Court, like the Supreme Court of Florida and the Florida state trial court before it, noted the overwhelming nature of the State's evidence and the circumstances facing Tunkey, the defense counsel:

"The fact of Washington's voluntary, detailed confessions to multiple crimes is extremely unusual, and according to the testimony during the hearing, rarely occurs in capital cases. To suggest that Mr. Tunkey failed to make the necessary investigation is not to impugn his general qualifications. By all accounts, he is an was a competent, experienced criminal attorney, who in the Washington case, was faced with a unique and potentially overwhelming situation." A280-A281.

Relying upon the standard of review in United States v. DeCoster, 634 F.2d 196 (D.C. Cir. 1979)(en banc) and Knight v. State, supra, the United States District Court found inter alia that the Defendant had not been prejudiced in any way

whatsoever by Mr. Tunkey's actions or inactions. A282-A283. In reviewing the affidavits and "new evidence" proposed by the Defendant, the United States District Court concluded that:

"[R]eviewing the proposed character and psychiatric testimony, and weighing it against the detailed record of petitioner's conduct in initiating and carrying out three separate episodes of planned robbery, kidnapping and murder, there does not appear to be a likelihood, or even a significant possibility that the balancing of aggravating against mitigating circumstances under the Florida death penalty statute would have been altered in petitioner's favor. Critically, the character and medical testimony cannot reasonably be characterized as evidence of extreme mental or emotional disturbance. Nor does it provide persuasive rationalization for petitioner's extended and calculated course of violence. Therefore, it is my determination on the critical legal issue, that petitioner was not prejudiced by the inaction which did occur, and was not denied his Constitutional right to effective assistance of counsel, as that standard is defined under present case law." [Emphasis added]. Id.

Subsequently, the Defendant filed his Notice of Appeal⁸. JA509. The State subsequently filed a Notice of Cross-Appeal, in order to challenge specifically on appeal: 1) Whether a hearing was required at all in the face of the record; 2) Whether defense counsel was ineffective; and 3) the specific rejection of the State's claim that the Defendant had abused the Writ⁹. JA510. The panel of the Eleventh Circuit in a sharply divided opinion, rejected both Knight and DeCoster and reversed holding that all a defendant need show to establish ineffective assistance of counsel,

⁸When the U.S. District Court vacated its stay, the State in Strickland v. Washington, U.S. Sup. Ct. Case No. A-909, unsuccessfully attempted to have this court vacate the subsequent stay imposed by the Eleventh Circuit.

⁹The en banc court erroneously considered that the State's cross-appeal addressed only the question of the abuse of the Writ. 693 F.2d at 1264, n.34 (A168).

is that evidence was omitted which might be "helpful to him." Washington v. Strickland, 673 F.2d 879, at 901-902 (5th Cir. 1982). The panel opinion further held that the state trial judge's testimony as an expert witness was not admissible under Fayerweather v. Ritch, 195 U.S. 276 (1904). The panel reasoned that Judge Fuller was impeaching his prior verdict. See, 673 F.2d at 902-906.

On May 14, 1982, the Eleventh Circuit sua sponte vacated the panel opinion and ordered a rehearing en banc. 679 F.2d 23 (5th Cir. 1982). Upon en banc rehearing the Eleventh Circuit expressly rejected United States v. DeCoster, supra (693 F.2d at 1261) and "[struck] down the Florida Supreme Court's standard for reviewing the ineffective assistance of counsel claims set forth in Knight v. State . . ." 693

F.2d 1287; 1248 at n 5. The Court held: 1) that the district court had failed to properly consider the claim that Tunkey was ineffective because he failed to investigate the case; 2) that the court had improperly allocated the burden of proof to the Defendant and 3) that the testimony of Judge Fuller that the new evidence presented by the Defendant would not make any difference in his sentences, was "improperly admitted. Id. at 1248-1264.

With regard to the first ground, the Eleventh Circuit concocted a convoluted "list" of various combinations of the duty to investigate which the District Court must apply to determine whether Tunkey was ineffective. Id. at 1251-1258. With respect to the second issue, the en banc court relied upon the first half of the test in United States v. Frady, __ U.S. ___, 102 S.Ct. 1584 (1982), holding

that a defendant must only show that his claim of error, "worked to his actual and substantial disadvantage." Id. at 1258. In analyzing the second issue, the Eleventh Circuit noted that the Supreme Court of Florida in Knight had specifically relied upon the rule in DeCoster. Id. The Eleventh Circuit specifically rejected the rule in DeCoster. Id.; 1261-1262. The court decided instead that a defendant need only show by a preponderance of the evidence that he suffered actual prejudice from the claimed deficiency of his counsel, but not that it affected the outcome of the case in any manner whatsoever. Id. at 1258-1262.

With regard to the third issue, citing Fayerweather v. Ritch, 195 U.S. 276 (1904), the court held that the testimony of Judge Fuller was incompetent because it constituted impeachment

of Judge Fuller's prior verdict. Id., at 1262-1263. The court reasoned that Judge Fuller could not consider the affect of any offered new evidence upon his previous judgment imposing the death penalty. Id.

In sum, the en banc court ruled that a defendant may overturn his conviction, which was accomplished by proof beyond reasonable doubt, by a mere preponderance of evidence upon collateral claims. The State can then only rebut such a showing by proof beyond a reasonable doubt that a defendant's claims did not affect the outcome of the case. The State is however precluded from presenting the trial judge, who is the best evidence of its "proof beyond a reasonable doubt." At the same time, a defendant's proof by a mere preponderance of the evidence, may be accomplished by demonstrating any

combination from a "laundry list" of errors approved by the court.

The three dissenting judges vigorously concluded that Tunkey was not even remotely ineffective. Id., at 1285-1287. The dissent further observed that the majority opinion is an exercise in semantics contrary to the duty of the federal courts under the habeas corpus statutes and contrary to the reality of the evidence in the present case. Id., at 1287. The dissent finally complained that the majority was engaging in an exercise in futility inasmuch as the matter had already been extended through protracted litigation and the papers presently before the court did not demonstrate in any way whatsoever, "that any other strategy would have had any likelihood of dissuading the [State Court] judge from imposing the death penalty." [Emphasis added] Id.

Neither the State nor the Defendant sought a rehearing upon the en banc rehearing opinion. The present decision has, however, been stayed pending review in this Court. Subsequently, on January 20, 1983, in Sampson v. Armstrong, 429 So.2d 287 (Fla. 1983)(A195-A324), the Florida Supreme Court expressly acknowledged the Eleventh Circuit's opinion herein but declined to follow it. Instead, the Florida Supreme Court reaffirmed its view that Knight is "constitutionally correct."

SUMMARY OF ARGUMENT

1.) An evidentiary hearing in the present cause was not necessary where the issues are patently without merit upon the face of the record. The Defendant confessed to three brutal murders, which were committed in one ten-day period and pleaded guilty. The Defendant does not challenge the plea of guilty. The Defendant only challenges his sentence of death. If there is a death penalty case, this, "to a moral certainty" is a death penalty case. The Defendant's sentence has been reviewed and affirmed twice on appeal by the Florida Supreme Court and three times by three other separate courts of competent jurisdiction. There is neither authority nor cause for the Eleventh Circuit to intrude into the State sentencing process.

2.) The Eleventh Circuit's analysis of

claims of ineffective assistance of counsel relying upon a proposed "laundry list of errors," flys into the face of Gideon and its progeny. The proper focus of any claim of ineffective assistance of counsel is not upon a list of potential omissions, but rather upon whether a defendant received a fundamentally fair trial within the meaning of the Fourteenth Amendment.

3.) The Eleventh Circuit has improperly allocated the burden of proof and the degree of proof required for a prima facia claim in collateral proceedings.

4.) The Eleventh Circuit has improperly applied United States v. Frady, __ U.S. ___, 102 S.Ct. 1584, (1982). The court's opinion only applies the first part of the test explained in Frady that a defendant must show that the errors he complained of, "worked to his actual and substantial disadvantage." Frady

consistent with Knight and DeCoster, also holds that a defendant must show that these errors were such that they, "infect[ed] his entire trial with error of constitutional dimension."

5.) The testimony of the State trial judge, Richard Fuller, was properly admitted without an articulate objection as an expert by both parties and the court. Judge Fuller's testimony was also properly admitted consistent with, settled substantive and statutory authority and judicial analysis and evaluation of new evidence of any nature under United States v. Agurs, 427 U.S. 97 (1976). The Eleventh Circuit has completely misapplied and erroneously interpreted Fayerweather v. Ritch, 195 U.S. 276 (1904). If Fayerweather does stand for the proposition which the court claims, it must be overruled.

ARGUMENT1) SUBSTANTIAL DEPARTURE FROM
ACCEPTED OR USUAL COURSE OF
JUDICIAL PROCEEDINGS.

Washington's attack upon his sentence is frivolous. Though the penalty herein is death, yet another extraordinary review of that penalty is not the function of the habeas corpus writ or this Court and its inferior courts. The Eleventh Circuit in this cause and others¹⁰ has permitted defendants to drag the federal courts into the substantive state sentencing process.

¹⁰In Proffitt v. Wainwright, 685 F.2d 1227, at 1262, n 54 (11th Cir. 1982), cert. pending, U.S. Sup.Ct. Case No. 83-113, the Court expressly repudiated the principle explained in Spenkellink and applied in Barclay, Stephens and Barefoot:

"In view of Godfrey, we can only conclude that the language in the Spinkellink opinion precluding federal courts from reviewing state courts' application of capital sentencing criteria is no longer sound precedent."

Compare, Barclay v. Florida, ___ U.S. ___, 103 S.Ct. 3418 (1983); Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733 (1983); see, also, Barefoot v. Estelle, ___ U.S. ___, 103 S.Ct. 3383 (1983); Spinkellink v. Wainwright, 578 F.2d 582 at 613-614 (5th Cir. 1978), cert.den. 440 U.S. 976 (1979). Although the present sentence has been reviewed by four state courts of competent jurisdiction, the Eleventh Circuit has totally ignored the state court's review under the guise that the major issue, competency of trial counsel, presents a "mixed question of law and fact." The only inquiry should have been whether the proceeding below was fundamentally fair. See, Discussion at pp. 67-81. It was and therefore under Barclay, Zant, and Barefoot there is neither authority nor cause to review the present sentence further.

The Defendant's claims should have been rejected on the face of the record without any requirement of an evidentiary hearing. See, e.g., Parker v. North Carolina, 397 U.S. 790 (1970)(record refutes the defendant's allegations); Chambers v. Maroney, 399 U.S. 42 at 53-54 (1970)(same). The Defendant was convicted and sentenced to death on December 6, 1976. He did not complain about his trial attorney until September 19, 1980, in response to clemency proceedings. The Defendant confessed to three (3) of the most brutal murders in Florida's history and pleaded guilty. In the words of the Florida Supreme Court, "the atrocity of the episode cannot be gainsaid." 362 So.2d at 665. The Defendant has not raised any issue as to his or guilt or challenged his pleas of guilty. The Defendant only assails the propriety of his sentence, by suggesting

that his attorney did not produce additional cumulative, amorphous evidence of non-statutory mitigation¹¹. The Defendant's challenge to his sentence is specious.

A federal court's intrusion into a state's capital sentencing process is warranted where a defendant can plainly show, "that the facts and circumstances of his case are so clearly undeserving of capital punishment that to impose it would be patently unjust and would shock the conscience." Spenkellink v. Wainwright, 548 F.2d at 606 n. 28. Such is not even remotely the situation in the

¹¹Upon a new sentencing proceeding the State would, however, also have the opportunity to show an additional statutory aggravating circumstance under Section 921.141(5)(b) Florida Statutes (1977) which was erroneously by excluded by the trial court because of defense counsel's efforts. See, A216-A217 (state trial court order denying collateral relief).

case at bar as is evident upon the face of the record. As the dissent below observed, if there is a death penalty then this is a death penalty case¹² and further proceedings are "a fruitless prolongation of an already protracted litigation." 693 F.2d at 1287.

As noted, contrary to Sumner v. Mata, 449 U.S. 539 (1981) and Townsend v. Sain, 372 U.S. 293 (1963), neither the District court nor the Eleventh Circuit

¹²See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Spenkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. den. 440 U.S. 976 (1978); State v. Dixon, 283 So.2d 1 (Fla. 1973) ("when one or more of the aggravating circumstances is found, death is presumed to be the proper sentence"); compare, e.g. Straight v. State, 397 So.2d 903 (Fla. 1981) (no statutory mitigation); Booker v. State, 397 So.2d 910 (Fla. 1981) (no statutory mitigation); Ruffin v. State, 397 So.2d 227 (Fla. 1981); Peek v. State, 395 So.2d 492 (Fla. 1981) (same); Thompson v. State, 389 So.2d 197 (Fla. 1980); Antone v. State, 382 So.2d 1205 (Fla. 1980); Ford v.

has given any substantive consideration to the presumptively valid determinations by both the Supreme Court of Florida and the State trial court that Tunkey was not ineffective on the face of the record. The state courts applied the proper standard of "fundamental fairness" (see, Discussion infra at pp. 67-81) and their determinations are soundly supported by a competent record which should not have been disturbed. See, Jackson v. Virginia, 443 U.S. 307 (1979); Sumner v. Mata, supra. The federal courts discarded these

(Footnote 12 cont.) State, 374 So.2d 496 (Fla. 1979); Fleming v. State, 374 So.2d 954 (Fla. 1979); Hargrave v. State, 366 So.2d 1 (Fla. 1979); Gibson v. State, 351 So.2d 948, at 951 (Fla. 1977)(no mitigating, three (3) aggravating); LeDuc v. State, 365 So.2d 149, 152 (Fla. 1978)(no mitigating); Jackson v. State, 359 So.2d 1190 (Fla. 1978)(no mitigating); Darden v. State, 329 So.2d 287 (Fla. 1976)(no mitigating); Douglas v. State, 328 So.2d 18 (Fla. 1976)(no mitigating); Sullivan v. State, 303 So.2d 632 (Fla. 1974)(Overton, J. concurring).

carefully considered opinions by totally ignoring them. See, Sumner v. Mata.

Should a state judgment be set aside simply because a federal court disagrees or is not in philosophical accord with a state judgment or sentence, under the guise of calling it "a mixed question of law and fact" and then improperly decides the issue de novo¹³? Or are federal courts going to be bound by a standard which restores some semblance of integrity to state court judgments¹⁴? Sumner v. Mata; Townsend v. Sain, and the application of the proper standard of

¹³See, e.g., Pullman-Standard v. Swint, U.S. ___, 102 S.Ct. 1781, at 1789-1791 (1982).

¹⁴See, Donnelly v. DeChristoforo, 416 U.S. 637 (1974) (federal court review of state court conviction process is not under its supervisory powers); Marshall v. Lonberger, ___ U.S. ___, 103 S.Ct. 843 (1983) (the "fairly supported by the record" requirement does not permit a federal court to reweigh the facts surrounding a state court judgment).

review discussed below, require affirmation on the face of the record.

2) STANDARD FOR REVIEW FOR CLAIMS
OF INEFFECTIVE ASSISTANCE OF COUNSEL

The central analysis in the present cause is the nature and source of the right to counsel afforded by the Sixth Amendment. The Eleventh Circuit requires that we descend into an endless labyrinth of assertions of ineffective counsel by the bootstrap of hindsight, focusing not upon what counsel did, but rather upon a list of what he did not do. The proper analysis is predicated upon fundamental due process and thus focuses upon what counsel did and whether a defendant has been denied, "a fundamental right essential to a fair trial," in the context of the entire proceeding. See, Gideon v. Wainwright, 372 U.S. 335, at 339-344 (1963).

The Sixth Amendment provides only that, "the accused shall enjoy the right . . .to have the assistance of counsel for his defense." No statement is made as to the quantity or quality of "counsel" constitutionally required. Indeed, in Scott v. Illinois, 440 U.S. 367, at 370 (1979) the Court remarked that, "[t]here is considerable doubt that the Sixth amendment itself as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of the accused in a criminal prosecution * * * to employ a lawyer to assist in his defense." See, also, Powell v. Alabama, 297 U.S. 45 at 69-70 (1932)(the fundamental right to counsel requires the presence of counsel to assist in defense). In Gideon v. Wainwright, the Court affirmed the historical analysis in Betts v. Brady, 316 U.S. 455 (1942) that

the Bill of Rights are fundamental safeguards, which find application to the states only through the due process clause of the Fourteenth Amendment. 372 U.S. at 342-341. The Gideon court noted that the defendant's claim was therefore whether he had been, "denied the right to assistance of counsel in violation of the Fourteenth Amendment," 372 U.S. at 339, and whether the right to counsel was, "'fundamental and essential to a fair trial' [and] made obligatory upon the States by the Fourteenth Amendment." See, 372 U.S. at 342. The Gideon court concluded that the due process clause of the Fourteenth Amendment required the application of the Sixth Amendment right to counsel to the States. Cf. also, Mapp v. Ohio, 367 U.S. 643 (1961). As an essential premise to its analysis the Court noted that in any due process

inquiry the concern is whether in the totality of the circumstances the proceeding was fundamentally unfair:

"Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." [Emphasis added]. 372 U.S. at 339 quoting Betts v. Brady, 316 U.S. at 462 with approval.

An unbroken line of decisions by the Court has thus focused upon the fundamental denial of due process in the complete absence of counsel or in critical circumstances tantamount to the total denial of counsel¹⁵.

¹⁵See, Powell v. Alabama, supra, (ability to confer); Avery v. Alabama, 308 U.S. 444 (1940)(ability to confer); Ferguson v. Georgia, 365 U.S. 570 (1961) (no direct examination of defendant); Hamilton v. Alabama, 368 U.S. 52 (1961) (no counsel at guilty plea); White v. Maryland, 373 U.S. 59 (1963)(same);

Indeed, this Court has more recently held, that the central consideration upon ineffective counsel claims is whether a defendant has been denied fundamental due process and a fundamentally fair trial. See, United States v. Frady, ___ U.S. ___, 102 S.Ct. 1584 (1982); Engle v. Isaac, ___ U.S. ___, 102 S.Ct. 1558 (1982)¹⁶.

The focus upon the fundamental nature of the right to counsel rather than laboring over a "laundry list" of things counsel might have done is consistent with the proper application

(Footnote 15 cont.) Geders v. United States, 425 U.S. 80 (1970) (consultation with defendant); Brooks v. Tennessee, 406 U.S. 605 (1972) (defendant required to testify as first defense witness); Herring v. New York, 422 U.S. 853 (1975) (denial of closing argument); Faretta v. California, 422 U.S. 806 (1975) (no consent to counsel); Holloway v. Arkansas, 435 U.S. 475 (1978) (conflict of interest); Cuyler v. Sullivan, 446 U.S. 335 (1980) (same).

¹⁶See, also, Henderson v. Kibbe, 431 U.S. 145 (1977); United States v. Agurs, 427 U.S. 97 (1976); Cupp v. McNaughten, 414 U.S. 141, at 146 (1975) ("Before a

of the great writ and is essential to finality¹⁷. See, also, Discussion, at pp. 85-90. "A criminal trial concentrates society's resources at one 'time and place in order to decide within the limits of human fallibility, the question of guilt or innocence.'" Engle v. Isaac, 102

(Footnote 16 cont.) Federal Court may overturn a conviction resulting from a state trial. .it must be established not merely that the [State's action] is undesirable, erroneous; or even 'universally condemned', but that it violated some right which was guaranteed to the defendant by the XIV Amendment"); Darcy v. Handy, 351 U.S. 454 at 462-463 (1956); see, also, Rose v. Lundy, ___ U.S. ___, 102 S.Ct. 1198 at 1216 (1982) (Stevens, J., dissenting; the purpose of the writ is to address fundamental unfairness).

¹⁷This Court has already made a pronouncement in Wainwright v. Sykes, 433 U.S. 72 (1977) discounting constitutional claims predicated upon lists of omissions by counsel. The present analysis by the Eleventh Circuit allows claims barred by Sykes to be raised routinely under the guise of "effective assistance of counsel." Thus the "cause and prejudice" requirement under Sykes, a cornerstone of habeas corpus analysis, is totally abrogated.

S.Ct. at 1571. "Every trial presents a myriad of possible claims." Id., at 1574. It is therefore inevitable that counsel will through strategy, ignorance, mistake or many other reasons choose to omit certain claims while pursuing others.Id., at 1572, n 34; 1574-1575. The Constitution therefore does not and could not require that counsel recognize and raise every conceivable claim. Id.; Wainwright v. Sykes, 433 U.S. 72 at 91 (1977); Estelle v. Williams, 425 U.S. 501 at 512-513 (1976). In United States v. Hastings, ___U.S.____, 103 S.Ct. 1974, at 1980 (1983), the Court observed that, "taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial and that the Constitution does not guarantee such a trial." Due regard for finality supposes that a criminal trial must not be followed by a

trial of a defendant's lawyer. See, Wainwright v. Sykes, 433 U.S. at 114 n 13 (Brennan, J., dissenting); see, also Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoner," 76 Harv.L.Rev. 741 (1963). Such a practice, "degrades the prominence of the trial itself"¹⁸. Engle, 102 S.Ct. at

¹⁸Additionally, part of the motivation for the analysis in Knight and DeCoster is that unduly intrusive scrutiny of defense strategy in the course of considering a post-conviction claim of ineffective assistance of counsel could dampen the ardor of the defense bar and require a potentially unseemly probing of the relationship and communications between attorney and client, thereby undermining the sense of mutual trust in criminal cases generally. See, United States v. DeCoster, 624 F.2d at 208-209; Id., 228-229 (MacKinnon, J. concurring); Knight v. State, 394 So.2d at 1001, cf., Polk County v. Dodson, 454 U.S. 312 at 324, n 17 (1981). "The effect on the [defense bar] would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." Upjohn Co. v. United States, 449 U.S. 383, 398 (1981), quoting Hickman v. Taylor, 329 U.S. 495, 510-511 (1947). Indeed, in the present case Mr. Tunkey was visibly distressed about testifying "against" his former client.

1571. Moreover, the underlying purpose of the habeas corpus writ is, "a bulwark against convictions that violate 'fundamental fairness.' "[Emphasis added] Engle v. Isaac, 102 S.Ct. at 1570, see, also,

(Footnote 18 cont.) Such inquiries also undermine the constitutionally required independence of defense counsel, see, Polk County, 454 U.S. ___, at 318-319, 321-322; Estelle v. Williams, supra, 425 U.S. at 512, by inducing courts and prosecutors to oversee and second-guess judgments by defense counsel in order to protect the conviction from later attack on the basis of ineffective assistance of counsel. DeCoster, 624 F.2d at 208 (plurality, opinion); Id. at 228-229 (MacKinnon, J. concurring); Bines "Remedying Ineffective Representation in Criminal Cases: Departure From Habeas Corpus," 59 Va.L.Rev. 927, 961 (1973); see also Schwarzer, "Dealing With Incompetent Counsel--The Trial Judge's Role" 93 Harv. L.Rev. 633, 650 (1980). However, at least one judicial commentary has suggested wholesale intrusion by the judiciary in ongoing proceedings to assure effective assistance of counsel. See, Schwarzer, J., "From the Bench: Assuring Effective Assistance of Counsel, 7 ABA J. of Litigation 5 (1981); see also, Schwarzer, "Dealing with Incompetent Counsel," supra, at 651-665; Note: "A Functional Analysis of the Effective Assistance of Counsel," 80 Colum.L.Rev. 1053, 1069 (1980).

Friendly, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgments," 38 U. Chi.L.Rev. 142 (1970). The reexamination of counsel's performance must therefore rest upon only fundamental fairness and not upon a list of potential errors¹⁹.

In the present case, the Eleventh Circuit has based its analysis of ineffective assistance of counsel claims upon the "laundry list" of errors theory of ineffective assistance of counsel as proposed by Judge Bazelon in "DeCoster I"²⁰ and "DeCoster II"²¹, which was

¹⁹This analysis is also compatible with the original purpose of the writ at common law to correct only fundamental error. See, Ex Parte Bollman, 8 U.S. (4 Cranch) 75, at 95 (1807) (Marshall, C.J.); J. Story, Commentaries on the Constitution of the United States, 157 (1883); McFeely, "The Historical Development of Habeas Corpus," 30 S.W.L.J. 585 (1976).

²⁰United States v. DeCoster, 487 F.2d 1196 (D.C. Cir. 1973).

²¹United States v. DeCoster, 624 F.2d 300 (D.C. Cir. 1976).

specifically rejected by the en banc court in DeCoster III. See, also, Darcy v. Handy, 351 U.S. 454 at 462-463 (1956) (merely because counsel did not complete a list of things he could do does not establish error in the constitutional sense). Contrary to the present decision, but consistent with Gideon and its progeny, DeCoster, Knight and the "farce and mockery" decisions²² continue to focus upon whether counsel was "constitutionally adequate" and thus whether a defendant has been denied a fundamentally fair trial and thus fundamental due process. See, e.g., Rickenbacker v. Warden, Auburn Correctional Facility, 550 F.2d 62, at 65

²²See, e.g. United States v. Williams, 575 F.2d 388 at 393 (2d Cir. 1978); United States v. Wight, 176 F.2d 376, at 379 (2d Cir. 1949), cert. den., 338 U.S. 950 (1950); United States v. Ramirez, 535 F.2d 125, at 129 (1st Cir. 1976).

(2d Cir. 1976)[citing Gideon v. Wainwright, 372 U.S. 335 (1963)].

The "laundry list" of errors theory of reviewing ineffective assistance of counsel claims derives from unwarranted extrapolation of McMann v. Richardson, 397 U.S. 759 (1960). In considering only the validity of a guilty plea following a coerced confession, the McMann Court in obiter dicta observed that counsel's advice to plead guilty should be viewed as to whether the advice, "was within the range of competency demanded of attorneys at criminal cases." Without guidance from this Court, various courts²³ have extended the McMann "standard" to all

²³See, e.g., United States v. Bosch, 584 F.2d 1113, at 1121 (1st Cir. 1978); Marzullo v. Maryland, 561 F.2d 540, at 543 (4th Cir. 1977)(en banc); Moore v. United States, 432 F.2d 730, at 736 n. 25 (3d Cir. 1976)(en banc); see, also, Washington v. Strickland, 693 F.2d at 1250.

Sixth Amendment ineffective assistance claims in general and have affirmatively abandoned any fair trial/fundamental due process analysis, in favor of a labyrinth of lists and a mush of semantics conceived in the serenity of the appellate process²⁴. As for example,

²⁴See, e.g., United States v. Bosch, supra at n. ("reasonably competent assistance" standard is "shorthand" for "assistance within the range of competence expected of attorneys in criminal cases."; Moore v. United States, 432 F.2d 730 at 735-738 (3d Cir. 1970)(counsel must exercise, "the customary skill and knowledge which normally prevails at the time and place."); Marzullo v. Maryland, 561 F.2d 540 at 540 (4th Cir. 1970)("within the range of competency demanded of attorneys in criminal cases"); Washington v. Watkins, 655 F.2d 1346, at 1355 (5th Cir. 1981)("counsel reasonably likely to render and rendering reasonably effective assistance"); Boyd v. Estelle, 661 F.2d 388, at 389 (5th Cir. 1981)(counsel's performance must be "seriously inadequate"); Beasley v. United States, 491 F.2d 687, at 696 (6th Cir. 1974) ("counsel must perform at least as well as a lawyer with ordinary training. . . and must conscientiously protect his client's interest"); United States ex rel. Edwards v. Warden, 676 F.2d 254, at

the phrase "effective assistance of counsel" as developed by Courts under the guise of McMann is fraught with error because it contemplates a degree of success as a constitutional mandate. See, United States v. Hasting; Engle v. Isaac; Wainwright v. Sykes; Estelle v. Williams, supra. Furthermore, as Judge Leventhal noted after his review in DeCoster such a "standard" has served only to generate a "semantic merry-go-round." 624 F.2d at 206.

(Footnote 24 cont.) 258 (7th Cir. 1982) ("within the reasonable range...constitutionally required") United States v. Weston, 708 F.2d 302 (7th Cir. 1983) (representation which is in any aspect . . . shockingly inferior to what may be expected of the prosecution's representation"); Long v. Brewer, 667 F.2d 742, at 745 (8th Cir. 1982) ("behavior. . . falling measurably below that which might be expected from an ordinary fallible lawyer"); Cooper v. Fitzharris, 586 F.2d 1325 at 1330 (9th Cir. 1978) ("serious dereliction"); Dyer v. Crisp, 613 F.2d 275, at 278 (10th Cir. 1979) ("skill, judgment and diligence of a reasonably competent defense attorney").

With such endless ambiguity any lawyer's performance can be assaulted, even upon the same act or omission, claiming that he should have done the other. See, Williams v. Maggio, 679 F.2d 381 at 393 (5th Cir. 1982) ("There is little doubt that had trial counsel [called witnesses] proposed by petitioner, this Court would now face an ineffectiveness of counsel argument based thereon").

Lawful judgments are mired in such verbiage to the extent that justice and finality become an illusion and abusive manipulation of the great writ, routine²⁵. See, Paprskar v. Estelle, 612 F.2d 1003, at 1008-1009 (5th Cir. 1980) (Coleman, C.J., concurring). Even

²⁵See, also, Evans v. Bennett, 440 U.S. 1301, at 1303 (1979) (Rehnquist, J.); Friendly, "Is Innocence Irrelevant?" supra; Bator, "Finality in Criminal Law", supra.

a casual examination of West's Federal Reporter reveals burgeoning claims of ineffective counsel under such amorphous "standards". Depending on the predilections and experience of any given Court such verbiage can mean virtually anything, including that a defendant need only show something which might be "helpful" was omitted. See, Washington v. Strickland, 673 F.2d 879 at 901-902 (5th Cir. 1982)(panel opinion); see also, United States v. Cronic, 675 F.2d 1126 (10th Cir. 1982) cert. granted, 32 Crim. L.Rep. 4193 (1983)(no showing of prejudice required; no evidentiary hearing or government response permitted).

This Court should not adopt such a test which requires that an unsuccessful attorney be routinely put on trial after a defendant has been convicted. McMann

v. Richardson, never contemplated such a result. In McMann the court only intimated without example, that advice to plead guilty in the face of a manifestly coerced confession and a substantial likelihood of acquittal on the prosecution's remaining evidence, could be a denial of the right to counsel²⁶. As in the foregoing authority, as a matter of common sense, such a circumstance has a substantial effect upon the outcome of the proceeding and is tantamount to no counsel at all under the Sixth Amendment and hence fundamentally unfair. See, Pennsylvania ex rel. Herman

²⁶The McMann court insisting upon the integrity of the guilty plea, reversed the circuit court's order granting an evidentiary hearing, holding that a bare claim of a coerced confession was not sufficient for relief. 397 U.S. at 771. The defendants apparently made no allegation that the prosecution's evidence was otherwise deficient. Id. at 767-775.

v. Claudy, 350 U.S. 116 (1956) (uncounseled and coerced confession). The obiter dicta in McMann was therefore not an invitation to detailed supervision of defense practices or for wholesale abandonment of "fundamental fairness" as a standard of constitutional review. The consistent decisions of this Court wholly vitiate such a rational. The State submits that where the record demonstrates that a defendant received a fair proceeding, then he received "constitutionally adequate representation," which is all that is required. This Court should therefore reaffirm that analysis under Gideon and its progeny and clarify the obiter dicta in McMann. Cf., United States v. Ross, ___ U.S. ___, 102 S.Ct. 2157, at 2167-2168 (1982) [declining to follow dicta and clarifying Robbins v. California, 453 U.S. 420 (1981)].

3. BURDEN OF PROOF

This Court has consistently required that the burden of proof rests entirely with a defendant on collateral claims and that the proper analysis, like DeCoster, Knight and the "farce and mockery" decisions, is whether a defendant has been denied fundamental due process and a fair trial. See, United States v. Frady; Engle v. Isaac, supra²⁷.

²⁷see also, e.g. United States v. Campa, 679 F.2d 1006, 1014 (1st Cir. 1982)(the defendant must bear the burden of proof); United States v. Baynes, 687 F.2d 659, 670-671 (3d Cir. 1982)(Defendant must "demonstrate that there is a 'reasonable possibility' that had the error of which he complains not occurred, the jury might have arrived at a different outcome"; Defendant must "demonstrate that his attorney's ineffectiveness was not harmless beyond a reasonable doubt"); Rubio v. Estelle, 689 F.2d 533, 535 (5th Cir. 1982)(habeas corpus petition must show an "adverse impact upon the fairness of her trial resulting from [counsel's] lapse"); Youngblood v. Maggio, 696 F.2d 407, 409-410 (5th Cir. 1983)(habeas

In Darcy v. Handy, 351 U.S. 454 at 462 (1956), the court explained that a defendant seeking to set aside his trial must bear the entire burden of proof and must show actual prejudice:

"While this court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the results set aside, and that it be sustained not as a matter for speculation but as a matter of demonstrable reality.'" [Emphasis added; citations omitted].

Similarly, and consistent with DeCoster's rejection of Judge Bazelon's check lists of "do's and don'ts", in Cupp v. McNaughten, 414 U.S. 141 at 146 (1973) the court explained that a defendant must bear the entire burden and must still show a denial of fundamental fairness

(Footnote 27 cont.) petitioner must show counsel's performance "was so inadequate as to render his trial unfair").

irrespective as to whether the error
complained of is totally improper:

"Before a Federal Court may over-
turn a conviction resulting from a
state trial. . .it must be estab-
lished not merely that the [State's
action] is undesirable, erroneous;
or even 'universally condemned',
but that it violated some right
which was guaranteed to the defen-
dant by the XIV Amendment."

More recently, in Frady, the court
 explained that in federal collateral
 proceedings, a defendant must bear a
 greater burden of proof entirely:

"By adopting the same standard of
review for §2255 motions as would
be applied on direct appeal, the
Court Appeals accorded no signi-
ficance whatever to the existence
of a final judgment perfected by
appeal. Once the defendant's
chance to appeal has been waived or
exhausted, however, we are entitled
to presume he stands fairly and
finally convicted, especially when
as here, he already had a fair
opportunity to present his federal
claims to a federal forum. Our
trial and appellate procedures are
not so unreliable that we may not
afford their completed operation
any binding effect beyond the next

in a series of endless post-conviction collateral attacks. To the contrary, a final judgment commands respect." [Emphasis added]. 102 S.Ct. at 1593.

The Fraday court further explained:

"It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment. The reasons for narrowly limiting the grounds for collateral attack on final judgments are well known and basic to our adversary system of justice. [quoting] United States v. Addonizio, 442 U.S. 178, 184, 99 S.Ct. 2235, 2239, 60 L.Ed.2d 805 (1979)(footnotes omitted)."

* * *

"The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. [quoting] Henderson v. Kibbe, 431 U.S. 145, 154, 97 S.Ct. 1736, 52 L.Ed.2d 203 (1977)."
[Emphasis supplied]. Id.

See also, Hawk v. Olson, 326 U.S. 271 at 279 (1945) ("Petitioner carries the burden in a collateral attack upon a final judgment"); Johnson v. Zerbst, 304 U.S. 458 (1937) (same). In a companion case to Frady, in Engle v. Isaac, the Court explained that federal collateral attacks upon final state courts judgments even more strongly necessitate a Defendant carrying the whole burden to show constitutional error because of special finality and comity concerns:

"Respondents, finally, argue that we should replace or supplement the cause-and-prejudice standard with a plain-error inquiry. We rejected this argument when pressed by a federal prisoner, see United States v. Frady, U.S. ___, 102 S.Ct. 1584, 71 L.Ed.2d ___, and find it no more compelling here. The federal courts apply a plain-error rule for direct review of federal convictions. Fed.Rule Crim. Proc. 52(b). Federal habeas challenges to state convictions, however, entail greater finality problems and special comity concerns. We remain convinced that the burden of justifying federal habeas corpus relief for state prisoners is "greater

than the showing required to establish plain error on direct appeal." Henderson v. Kibbe, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736, 52 L.Ed. 2d 203 (1977); United States v. Frady, ___ U.S. ___, 102 S.Ct. 1584, 71 L.Ed.2d ___. "102 S.Ct. at 1575.

The present opinion contrary to the foregoing authority apparently considers that the present matter is on direct review and that the State must again bear a substantial burden to rebut a minimal "prima facie" showing by the Defendant. Under Frady, Engle and the foregoing authority, the present allocation of the burden of proof by the Eleventh Circuit is plainly erroneous. On collateral review, as this Court's decisions demonstrate, a defendant must bear the entire burden of persuasion.

4) DEGREE OF PROOF

The Eleventh Circuit erroneously affirmed the panel's view that a defendant need not show any likelihood that the matters he complains of had any affect upon the outcome of the proceeding. The most compelling demonstration of error in such a conclusion, is a comparison with the seminal decision of the court in United States v. Agurs, 427 U.S. 97 (1976). Essentially, the Defendant in the present case seeks to overturn the result below with "new evidence" which he claims his counsel failed to produce. In United States v. Agurs, in assessing the effect of new evidence consisting of Brady material upon a claim for a new trial, the court clearly delimited claims of constitutional error thus:

"The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." [Emphasis added]. 427 U.S. at 109-110.

More important to our present analysis however, the Agurs court conclusively held that a complaint of error concerning new evidence does not rise to constitutional magnitude unless there is a substantial likelihood that it would have affected the outcome of the cause:

"It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt rather or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." [footnote omitted; emphasis added]. Id., at 112-113.

Cf. also, Engle, 102 S.Ct. at 1574. In particular, the Agurs court opined that a defendant has a greater burden of proof to show that the outcome of a trial would be different when the new evidence is from a "neutral" source (rather than the prosecution), Id. at 111. This is precisely the present circumstance.

Consistent with Agurs, in Chambers v. Maroney, 399 U.S. 42, at 53-54 (1970) the Court rejected without a hearing the defendant's claim that counsel was ineffective because he was only appointed on the day of trial, where the record showed that the defendant had been appointed an attorney earlier than the first day of trial. 399 U.S. at 53-54. The thrust of the Chambers opinion was that there was no likelihood of an affect upon the outcome of the proceeding. Cf., also, 399 U.S. at 60 (Harlan, J. dissenting). More recently in United States v. Valenzuela-Bernal, ___ U.S. ___, 102 S.Ct. 3440 (1982)

the Court also held that with respect to Sixth Amendment claims in deportation proceedings, a defendant must show that his claims would have affected the outcome of the proceedings, citing inter alia, United States v. Agurs, supra. See also, Smith v. Phillips, ___ U.S. ___, 102 S.Ct. 940 (1980)(fair trial and fundamental due process claims must be examined from the standpoint of the affect if any upon the outcome of the trial); Kentucky v. Wharton, 441 U.S. 786, at 790-791 (1979)(same); cf., Hopper v. Evans, ___ U.S. ___, 102 S.Ct. 2049 (1982)(same); United States v. Morrison, 449 U.S. 361 (1981)(claim of Sixth Amendment violation had no effect upon outcome); Petition for Certiorari at notes 9, 12 and 13 (summary of state and federal decisions)

The State submits that the "heavy burden" standard in Agurs and the

"outcome" analysis of the foregoing authority, are totally consistent with the policy and underlying philosophy in collateral proceedings noted in Frady and are the central motivation for the rule in DeCoster and Knight. When matters a defendant complains of have no likely affect upon the outcome, it denigrates the entire criminal justice process to set aside the proceeding and flys into the face of any harmless error requirement. See, United States v. Hasting, ___ U.S. ___, 103 S.Ct. 1974 (1983). It is therefore not asking too much and indeed is consistent with the overwhelming substantive law that a defendant bear the burden to make such an initial showing. The present Eleventh Circuit opinion manifestly fails to adhere to that proper constitutional analysis.

5) MISAPPLICATION OF UNITED
STATES V. FRADY.

The Eleventh Circuit in its opinion purports to apply United States v. Frady, in rejecting the burden of proof explained in DeCoster and Knight. See, 693 F.2d at 1260-1262. This is a plainly erroneous reading of Frady. The Eleventh Circuit citing Frady holds that a defendant must show only that the errors he complains of, "worked to his actual and substantial disadvantage." Id. However, this standard is only part of this Court's holding in Frady. Under Frady, a defendant must also show that the errors he complained of were such that they, "infect[ed] his entire trial with error of constitutional dimension" [emphasis added]. 102 S.Ct. at 1596. The Frady court in fact, rejected the defendant's claims because the evidence against him was overwhelming. 102 S.Ct. at 1596-1597; compare also, United

States v. Valenzuela-Bernal; Hooper v. Evans, supra. The balance of the phrase in Frady and the application of it in Frady reveal that error claimed on collateral review must raise a substantial likelihood of an affect upon the outcome of the proceeding. The present decision by the Eleventh Circuit therefore constitutes a complete misreading of United States v. Frady, and a substantial departure from both the Rule in Frady and the proper constitutional analysis of the burden and extent of proof required by this Court's decisions. To the contrary, the apparent intent of the Eleventh Circuit is to relax the standard for review of constitutional error and a defendant's burden of proof directly in the face of Frady, Agurs and the foregoing authority.

6) DEFENDANT'S COUNSEL PROVIDED "CONSTITUTIONALLY ADEQUATE REPRESENTATION."

The State has provided this Court with virtually the total record below in the Joint Appendix. In considering the importance of this issue (Discussion supra at 67-81) the simplicity of the present facts and the already needless circle of litigation herein, the State would urge this Court to consider the record provided by the State and dispose of this matter²⁸. See, United States v. Hastings, 103 S.Ct. at 1981. First of all, as is evident upon the face of the record as discussed at pp. 60-67 (particularly in Judge Fuller's testimony), a

²⁸This Court should also consider that at least two of the victims were of such an age and condition, see JA162-JA176, that they may not be able to recite their ordeal again. See, Morris v. Slappy, U.S. ___, 103 S.Ct. 1610, at 1617 (1983).

battery of lawyers and pages of non-statutory mitigation could not have saved the Defendant from his fate. Secondly, as reflected in the testimony of Mr. Tunkey, his presentation and defense was soundly based upon his extensive experience; intimate knowledge of the trial judge and a reasoned tactical choice of the best course of action:

"Tunkey, Washington's court-appointed counsel, was a competent and seasoned criminal lawyer, thoroughly experienced in criminal and capital cases. Relying on his experience in prior capital cases and his familiarity with his client and the trial judge, the attorney, faced with the above undisputed facts, reached a reasoned, tactical decision as to the only course of action which he thought could result in a sentence of life imprisonment rather than a death sentence. Tunkey testified that the only strategy he believed to have a chance of success, given the predilections of the sentencing judge with whom he had become familiar in the course of his practice in the area, was the strategy he pursued. Aware the judge normally responded favorable to a free, unqualified,

unbargained for admission of guilt, Tunkey thought the only hope of leniency, given the nature of the crimes, was for Washington to show remorse and seek mercy."

Washington v. Strickland, 693 F.2d at 1286 (Roney, Fay and Hill, J.J., dissenting).

Furthermore, as noted above Tunkey was faced with catastrophic and overwhelming evidence which his own client had chosen not to dispute. Even at the critical moment of sentencing (though his memory was dimmed by the passage of five (5) years), Tunkey testified that his client wanted no one at the sentencing proceeding. See, T43 (JA408). It is not remotely constitutional error nor grounds for relief for counsel to have made such well-reasoned, tactical choices under such circumstances. See, Jones v. Barnes, ___ U.S. ___, 103 S.Ct. 3308 (1983); cf., Engle v. Isaac; McMann v. Richardson, supra.

7) MISAPPLICATION OF
FAYERWEATHER V. RITCH

The Eleventh Circuit's reliance upon Fayerweather v. Ritch, 195 U.S. 276 (1904), to exclude the testimony of Judge Fuller is a complete departure from the substantiave law and United States v. Agurs, and constitutes a plainly erroneous reading of Fayerweather. In the present case, Judge Fuller's testimony was not presented to impeach his verdict nor to disclose any mental impressions or conclusions, which he made in reaching any verdict. Compare, Fayerweather v. Ritch, supra; United States v. Crutch, 566 F.2d 1311 (5th Cir. 1978). Rather, Judge Fuller was called upon to testify as an expert witness. He was indeed offered and accepted by all concerned as an expert witness. See, JA443-JA445. An expert witness may under Rule 704 of the

Federal Rules of Evidence testify as to an ultimate fact, to wit:

"Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

The testimony of Judge Fuller under Rule 704 was also consistent with the provisions of 28 U.S.C. Sec. 2245, which provides that a trial judge may file a certificate as to the basis for a ruling including a sentence, which shall be admitted into evidence in any subsequent proceeding. See, e.g. Strader v. Troy, 571 F.2d 1263 (4th Cir. 1978)(sentence); Hampton v. Wyrick, 588 F.2d 632 (8th Cir. 1978)(state judge testifies as to sentence). Indeed, Gardner v. Florida, 430 U.S. 349 (1977), also contemplates that a sentencing trial judge must disclose and

"impeach" his sentencing judgment if he considered improper evidence²⁹.

Furthermore, in substance, Judge Fuller was called upon with respect to the effect of "new evidence". Consistent with Agurs Judge Fuller did only that which he must do under Agurs in evaluating "new evidence" and its effect if any upon the outcome of the proceeding³⁰. Therefore Fayerweather has

²⁹If this Court has any doubt as to how far the Eleventh Circuit will go with Fayerweather v. Ritch, it need only look to Proffitt v. Wainwright, 685 F.2d 1227, at 1255 (11th Cir. 1982), cert. pending, U.S.Sup.Ct. Case No. 83-113, wherein the Court pursuant to Fayerweather rejected Gardner as justification for a trial court disclosing if he improperly sentenced a defendant.

³⁰The Eleventh Circuit's analysis also herein totally undercuts the effect of this court's decision in United States v. Tucker, 404 U.S. 443 (1972), which contemplates precisely the present circumstance wherein the trial judge is ordered

been plainly misconstrued or should be overruled.

The Eleventh Circuit has also created a virtually untenable situation for the State in avoiding new trials in federal collateral proceedings. The Defendant may, by only a mere preponderance of the evidence, overturn his conviction, which was established beyond a reasonable doubt. The State is then placed in the position of again proving that the Defendant's conviction should be sustained beyond a reasonable doubt because there was no affect upon the outcome of the case, without being permitted to produce the best evidence to

(Footnote 30 cont.) to reconsider his verdict in terms of a change in the evidence. See, also, Smith v. Phillips, U.S. ___, 102 S.Ct. 940 (1982). Indeed, sending the present matter back to the state trial court for a new proceeding would be a useless gesture in the face of Judge Fuller's testimony, where he is the sitting judge for this matter.

support such a conclusion. Certainly the trial judge in any circumstance is the best evidence of that event as reflected by this court's analysis in Agurs and similar decisions³¹. It is irrational to suggest that Judge Fuller's testimony would be excluded if he had said that he would not impose the death penalty based upon the new evidence. See, Washington v. Strickland, 673 F.2d 879, at 911 (5th Cir. 1982)(Roney, J. dissenting).

³¹See United States v. Tucker, 404 U.S. at 452 (The Chief Justice and Blackmun, J. dissenting: "Surely Judge Harris, of all people is the best source of knowledge as to the effect, if any, of these two convictions in his determination of the sentence to be imposed").

CONCLUSION

This Court should recognize that, which is obvious to even a casual observer herein. If this Court permits interference with the State's right to carry out its judgment and sentence in a case such as the one at bar, for all practical purposes, otherwise valid judgments and sentences obtained under statutes found constitutional by this Court will be an exercise in futility. The well reasoned opinions of two state trial courts; two Florida Supreme Court opinions and the opinion of this Court's own United States District Court demonstrate that there is no rational ground for a contention that the death sentences are constitutionally inappropriate herein. The State has manifestly taken all of the

steps required of it and the State's lawful judgment and sentence herein should therefore be carried out. The present opinion should therefore be vacated and the petition for a writ of habeas corpus denied.

RESPECTFULLY SUBMITTED on this__ day of August, 1983, at Tallahassee, Florida.

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Office - Supreme Court, U.S.

FILED

NOV 29 1983

ALEXANDER L. STEVENS

CLERK

IN THE

Supreme Court of the United States

October Term, 1982

CHARLES E. STRICKLAND, *Superintendent, Florida State Prison*; JIM SMITH, *Attorney General of Florida*; and LOUIE L. WAINWRIGHT, *Secretary, Florida Department of Corrections*.

Petitioners,

v.

DAVID LEROY WASHINGTON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FORMER FIFTH CIRCUIT
(UNIT B)

BRIEF OF RESPONDENT

JOSEPH H. RODRIGUEZ
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QUESTIONS PRESENTED

1. Whether the federal courts properly made an independent determination of the respondent's claim that he was deprived of effective assistance of counsel under the Sixth Amendment.

2. Whether petitioner was deprived of the effective assistance of counsel guaranteed in the Sixth Amendment when his trial attorney neglected to conduct any independent investigation into readily available information in mitigation of punishment and, as a consequence, failed to develop favorable evidence about petitioner's character, background, and mental state at the time of the crimes, for presentation at his capital sentencing hearing.

3. Whether a habeas petitioner is entitled to relief under the Sixth Amendment when he establishes that inadequate counsel's serious derelictions impaired or adversely affected the presentation of the

defense though not necessarily the outcome of the trial.

4. Whether the court of appeals, in assessing petitioner's claim of ineffective assistance of counsel at sentencing, properly concluded that the district court erred in admitting and considering testimony of the state trial judge concerning his own mental processes in imposing sentence and his belief as to the effect he would have given to the mitigating evidence that inadequate counsel failed to obtain.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

No. 82-1554

CHARLES E. STRICKLAND, SUPERINTENDENT,
FLORIDA STATE PRISON, ET AL.,
PETITIONERS,

v.

DAVID LEROY WASHINGTON,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
FORMER FIFTH CIRCUIT (UNIT B)

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Respondent confessed, pled guilty and
was convicted of three counts of first
degree murder under Florida law. [Pet.

App. 4-7].¹ The critical proceeding for respondent -- the only state court hearing at which there were contested issues of law and fact -- was the sentencing phase of his capital case.

It is a basic, historical fact, found by the district court, that Mr. Washington's trial counsel, William Tunkey, ceased any serious preparation or investigation of Mr. Washington's case approximately one month after being appointed, because he was immobilized by a "hopeless feeling" upon learning that Mr. Washington had confessed to two capital murders in addition to the one on which Mr. Tunkey was representing him. [Pet. App. 264; J.A. 380, 382-84, 426].² Mr. Tunkey

1/ The Appendix of Petitioner on Jurisdiction will be referred to as "Pet. App."; the Joint Appendix will be referred to as "J.A.".

2/ The petitioners' selective presentation of the record in their Statement of the Case is at odds with the findings of

acknowledged that, after these confessions, he did not feel that "there was anything which [he] . . . could do which was going to save David Washington from his fate," [J.A. 400]³, and that his despair over the confessions resulted in a "cessation and end" to counsel's preparation. [J.A. 426].

The district court found that "this feeling was behind [Tunkey's] . . . failure

2/ continued

the district court. The petitioners did not challenge the district court's findings as clearly erroneous. See F.R.C.P. 52(a); Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982). The court of appeals essentially adopted the findings below. [Pet. App. 12-16].

3/ Mr. Washington surrendered to police on the first murder charge on October 1, 1976. [J.A. 255-57]. On October 7, 1976, Mr. Tunkey was appointed to represent Mr. Washington on the first murder charge and related crimes. [J.A. 372-73]. On November 5, 1976, Mr. Washington confessed to two additional murders. [J.A. 119-20, 123-39, 198-218]. On December 1, 1976, he pled guilty to three charges of capital murder and several other crimes. Petitioner's sentencing hearing was conducted on December 6, 1976, and he was sentenced to die on that date.

to do an independent investigation into petitioner's background and potentially mitigating emotional and mental reasons for the killings," [Pet. App. 282] as Mr. Tunkey admitted at the evidentiary hearing.⁴ [J.A. 376; 388-89; 376-77].

Mr. Tunkey was aware of the strong likelihood that respondent would be convicted of three capital murders based on the confessions. But Florida's capital sentencing procedure involves two separate phases: a guilt phase and a separate sentencing phase "to determine whether the defendant should be sentenced to death or life imprisonment." Fla. Stat. Ann. §921. 141(1). At the time of respondent's convictions, Florida law provided that at this sentencing hearing "evidence may be

^{4/} Prior to learning of the confessions, counsel had been directing his efforts toward pre-trial motions and discovery. He had not conducted any separate investigation or preparation for the sentencing phase. [Pet. App. 264; J.A. 376; 379-80].

presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated [in the statute.]" Id.⁵ In July of 1976, several months before Mr. Washington's surrender to the authorities, the Court sustained the constitutionality of the Florida death penalty statute, in part because that statute requires the sentencer to focus not only upon the individual circumstances of the crime but also on the character of the offender. Proffitt v. Florida, 428 U.S. 242, 251,

5/ Fla. Stat. Ann §921.141(1) (1983 Supp.) has since been amended and now provides:

"In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in [the statute]."

252 (1976).

As the findings of the District Court make clear, Mr. Tunkey was utterly unprepared to represent Mr. Washington at this sentencing inquiry. Other than some conversations with Mr. Washington in jail, and some futile efforts to meet with Mr. Washington's wife or mother after briefly speaking with them on the telephone [Pet. App. 264-65], Mr. Tunkey conducted no investigation for witnesses who could have provided mitigating information about Mr. Washington's character and background. [Pet. App. 265]. Moreover, despite Mr. Tunkey's recognition that there was "an absolutely inexplicable difference between the personality [of Mr. Washington] which I knew as compared to the crimes charged and the admissions he had made,"⁶ Mr.

6/ Pages 38-39 of the transcript of the evidentiary hearing in the district court

(footnote continues on following page)

Tunkey never sought to explore that discrepancy. He did not obtain any information relating to Mr. Washington's character and background from those who best knew him nor did he seek any psychiatric or psychological examination of Mr. Washington for evidence of statutory or non-statutory mitigating factors relating to his mental state at the time of the offenses.⁷

6/ continued

have been inadvertently omitted from the Joint Appendix. For the convenience of the Court, these pages have been reproduced in Appendix A to respondent's brief. The statement in the text appears on page 39 of the transcript of the evidentiary hearing in the district court, which is part of the record of the court of appeals.

7/ Two provisions of the Florida statute enumerate mitigating circumstances pertaining to a defendant's mental state: Fla. Stat. Ann. §921.141(6)(b) ("The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance"), and Fla. Stat. Ann. §921.141(6)(f) ("The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired").

Having failed to conduct any independent investigation into Mr. Washington's character and background or to seek any expert evaluation of Mr. Washington's mental state at the time of the crimes, Mr. Tunkey testified that:

I really could find very little to address myself to in terms of a relevant, cogent presentation of mitigating circumstances as outlined by the statute itself and certainly insofar as aggravating circumstances are concerned, I . . . did not feel exactly like I . . . had sufficient ammunition to persuade anybody that the State was not going to succeed in showing at least that they outweighed the mitigating circumstances.
[J.A. 404].

He thus decided that at the sentencing hearing he would "attempt to convince the judge of Washington's sincerity and frankness in pleading guilty, recognizing the sentencing judge as a judge who had acknowledged his respect for individuals who came before him in the court and admitted their guilt." [Pet. App. 265-66;

J.A. 403]. After Mr. Washington entered his guilty pleas to three capital murders, Mr. Tunkey offered no testimony or any other evidence at the sentencing hearing in support of a life sentence, but relied solely upon brief statements made by Mr. Washington at the guilty plea proceedings. [J.A. 322].⁸ In an argument at the close of the hearing that covers only three transcript pages [J.A. 320-24], Mr. Tunkey made no mention of Mr. Washington's family life or background; he did not suggest that there was any independent information about Mr. Washington's character and life history or mental state at the time of the crimes⁹ that should be considered by

8/ At these proceedings, Mr. Washington acknowledged his guilt and briefly referred to the pressure he was under at the time of the crimes. [J.A. 46, 52-53].

9/ Although Mr. Tunkey had asked the court in his sentencing memorandum to consider, as a mitigating circumstance,

(footnote continued on following page)

the sentencing judge.¹⁰

The record of the habeas proceeding establishes that there was a substantial amount of readily available evidence on the critical issue of whether Mr. Washington deserved to live or die. At the evidentiary hearing below, fourteen affidavits from Mr. Washington's neighbors,

9/ continued

that "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance" (see note 7 supra), he made no explicit reference to the nature of Mr. Washington's mental state at the time of the crimes. Mr. Tunkey never requested a presentence report on Mr. Washington's mental state, social background or life history. The district court below found that such a presentence report "may have provided additional independent information in mitigation of the aggravating circumstances previously shown." [Pet. App. 280].

10/ The district court did not find counsel's perfunctory closing argument, standing alone, to be persuasive evidence of ineffectiveness but found that it had to be evaluated "in light of the mitigating circumstances which may have been advanced upon a more complete investigation." [Pet. App. 280-81].

friends, former employees, family members, and community members were introduced.

[J.A. 338-65]. All of the affiants stated that they would have testified on Mr. Washington's behalf at his sentencing hearing but were never contacted by anyone involved in his defense.

These individuals all described David Washington as a responsible, nonviolent, young black man who did not use drugs or alcohol, was an active member of his church, was devoted to his family and eager to work, but was unable to find employment to support his wife and newly-born child. [J.A. 338-65]. They consistently expressed their belief that the David Washington they knew was not the type to commit a murder; many of them remarked that violent behavior was completely "out-of-character" for him.¹¹

11/ Leonard Brady, a Dade County police (footnote continues on following page)

Two affidavits of medical experts -- a psychiatrist and a psychologist -- were also introduced at the habeas hearing. [J.A. 6-9; 10-16]. As the district court found, these experts provided "information relevant to the issue of mental or emotional stress"¹² at the time of the crimes.

11/ continued

officer, best summed up the prevailing view of these affiants when he observed:

In all of the years that I have observed deviant behavior as a police officer, I have never seen anyone do something like David has done, with the history and character that David has. [J.A. 365].

12/ At Pet. App. 326, a portion of the district court's opinion containing this quote is omitted. The full passage can be found on page 58 of the record in the Court of Appeals and is as follows (omitted portions are underscored):

Investigation in the psychiatric areas would undoubtedly have produced information relevant to the issue of mental or emotional stress. This is evidenced by review of the

(footnote continues on following page)

[Pet. App. 9].¹³ In brief, the psychiatrist and the psychologist concluded that, while Mr. Washington was legally sane at the time of the crimes, his violent actions were attributable to the uncontrollable eruption of long-suppressed feelings of self-hatred and anger generated by exposure to extensive child abuse, incest and a broken and violent family situation, combined with the severe frustration and depression concerning his financial problems. Both doctors noted

12/, continued

affidavits from friends, relatives and medical personnel who examined the petitioner in recent years.

13/ After the hearing, respondent submitted the affidavit of a second psychiatrist to the district court. This psychiatrist reported that, at the time of the crimes, Mr. Washington was under the influence of extreme mental or emotional disturbance, and that he was unable to conform his conduct to the requirements of the law. [See note 7, supra]. [J.A. 495-503]

that Mr. Washington expressed substantial remorse during their interviews with him. [J.A. 6-9; 10-16].

Based on this record, the district court found: (1) that counsel "made an error in judgment" by failing to conduct an adequate investigation into factors relevant to the mitigation of Mr. Washington's sentence, and (2) that such an investigation "would have produced generally favorable information from family, friends, former employers, and medical experts," [Pet. App. 282-83], about Mr. Washington's character, background, social history, and mental state at the time of the crimes. But for Mr. Tunkey's failure to seek out mitigation witnesses, this evidence would have been before the tribunal that decided whether Mr. Washington was to live or die.

Despite these findings, the district court denied the petition because it

concluded that a death-sentenced prisoner must shoulder the additional burden of establishing that the outcome of the sentencing hearing would have been different in the absence of counsel's derelictions of duty. [Pet. App. 286]. In reaching this conclusion, the district court employed a standard established by the plurality opinion in United States v. Decoster, 624 F.2d 196 (D.C. Cir. 1979) (en banc) (Decoster III) and considered, but did not treat as determinative, the testimony of the sentencing judge who believed he would have still imposed the death sentence "even if he had considered the live testimony of character and psychiatric witnesses." [Pet. App. 285].

On appeal, a divided panel of the court of appeals reversed the judgment and remanded the case to the district court with directions to determine whether counsel's representation at the sentencing

phase had been ineffective and whether Mr. Washington had established prejudice -- i.e., "that but for his counsel's ineffectiveness, the sentencing phase, but not necessarily its outcome, would have been altered in a way helpful to him." The panel also held that, even if respondent satisfied this burden, the State could still show beyond a reasonable doubt that counsel's ineffectiveness was harmless and did not contribute to respondent's sentence. Washington v. Strickland, 673 F.2d 879, 906 (5th Cir. 1982) (Unit B).¹⁴

The en banc court of appeals¹⁵ agreed

^{14/} The panel directed the district court, in assessing prejudice, "not [to] take into consideration [the sentencing judge's] testimony as to his mental processes in sentencing Washington or his speculation on how these processes might have differed had additional evidence been presented to him." Id.

^{15/} Six separate opinions were issued by the en banc court of appeals. Eight members of the court rejected the outcome-determinative standard of prejudice while three judges would have adopted that test.

with the panel that the case should be remanded to the district court for further findings on whether counsel's lack of investigation constituted ineffective assistance. The court of appeals held that, in assessing whether counsel breached the duty to investigate, the district court should decide whether the failure to investigate was based on a reasonable strategic choice to pursue one line of defense at the expense of another. [Pet. App. 54-55].

The court of appeals also held that, should counsel be found ineffective, the district court should then separately assess whether the habeas petitioner has established prejudice -- i.e., "actual and substantial disadvantage to his defense."¹⁶ [Pet. App. 75, 81]. Finally, it held that, if the district court found actual and

^{16/} This standard of prejudice is derived from United States v. Prady, 456 U.S. 152, 170 (1982).

substantial disadvantage, the State was still to be afforded the opportunity to establish that the ineffectiveness of counsel was harmless beyond a reasonable doubt. [Pet. App. 76, 82-83]. The en banc court agreed with the panel (see note 14, supra) that the portion of the sentencing judge's testimony relating to his mental processes in reaching the verdict was inadmissible and should not be considered by the district court on remand. [Pet. App. 76-81].

SUMMARY OF ARGUMENT

I. The federal courts were not bound by the state court determinations of effective assistance of counsel in this case. The state courts held no evidentiary hearings and made no determinations that could be termed findings of fact to be presumed correct under 28 U.S.C. § 2254(d). Rather, the district court appropriately made

initial findings of fact and the court of appeals acted correctly in independently addressing an issue of federal constitutional law under the Sixth Amendment.

II. Claims of ineffective assistance of counsel should be measured by Sixth Amendment principles. Thus, petitioners and, to some extent, the en banc court are in error in relying on principles derived from due process and procedural default cases. While the Due Process Clause guarantees a fair trial, the Sixth Amendment posits that assistance of counsel is a precondition to a fair trial. And the Court's procedural default decisions presume both a fair trial and competent counsel.

Similarly, the Court should reject the en banc court's rigid and categorical approach to claims of ineffective assistance of counsel. Assertions of inadequate performance by counsel arise in a variety

of factual settings; categorical rules would necessarily be imprecise and would divert the courts from the central inquiry of whether counsel has, in a particular case, performed within the range of competence expected of criminal attorneys.

Rather, the court should set forth the governing factors, inherent in fundamental Sixth Amendment principles, that should guide the exercise of judgment by the lower courts in these fact-specific assessments.

These factors are derived from the basic functions counsel serves: He is a "guiding hand" to the accused through the legal process and a critical leg of the adversary process, a counterweight to the prosecutor. An attorney must, therefore, discharge certain basic responsibilities. He must: (1) function as an active advocate, providing "[u]ndivided allegiance and faithful, devoted service to a client." VonMoltke v. Gillies, 332 U.S. 708, 725 (1945); (2) act

as an informed advisor by providing the lawyer's skilled perspective on the case; and (3) conduct an adequate factual and legal investigation in order to be able to fulfill this advisory role in a proper manner.

The responsibility must be adequately discharged at sentencing as well as at trial. Particularly in the area of capital sentencing, effective counsel serves to ensure an individualized determination of life or death based on the character and background of the offender and the circumstances of the offense. Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733 (1983).

To prevail on a Sixth Amendment claim of ineffective assistance, a defendant must establish an adverse impact on the presentation of the case or other impairment to the defense from counsel's errors, not that the outcome would have been different with adequate counsel. The outcome-

determinative test is wholly inappropriate: It forces the federal courts to retry issues of guilt and penalty and to speculate on how the record might have been different and how these differences might have altered the perceptions of the original trier of fact. Instead of principled decisions focusing on an attorney's performance, the outcome-determinative test would generate a series of subjective judgments as to whether a person was properly convicted or sentenced. These would provide no guidance to conscientious counsel or reviewing courts.

In applying a standard of prejudice that focuses on the impairment to the defense, courts will necessarily be guided by certain factors: (1) the extent to which the defect in counsel's performance deprives the defendant of the essential attributes of counsel; (2) whether counsel's errors resulted in an improverish-

ment of the record; (3) the pervasiveness of counsel's derelictions; and (4) the nature and seriousness of the issues at stake.

The application of these principles to the present case demonstrates that the judgment below should be affirmed. Although the stakes were life or death, counsel failed to act as a zealous advocate, but rather ceased preparation for respondent's sentencing hearing out of a sense of hopelessness and despair. Because counsel had not conducted adequate investigation and preparation, he was in no position to provide the "guiding hand" that his client needed to make informed strategic choices. These derelictions fundamentally skewed the sentencing process because they deprived the sentencer of indispensable, individualized information about the accused, Zant v. Stephens, ___ U.S. ___, 103 S. Ct. 2733, 2743-44 (1983), that has

frequently been determinative in Florida capital sentencing decisions. Barclay v. Florida, ___ U.S. ___, 103 S. Ct. 3418 (1983).

III. The court of appeals correctly held that the state trial judge's testimony that the outcome would not have been affected should have been excluded at the habeas hearing. This testimony was irrelevant to the proper standard of prejudice under the Sixth Amendment. In addition, testimony about a judge's mental processes is inadmissible under Fayerweather v. Ritch, 195 U.S. 276 (1904) and its progeny. A contrary result would inevitably allow probing inquiries during federal habeas proceedings into the mental processes of judges and juries. Nor could the post hoc testimony of the state sentencing judge possibly comply with the requirement of reliability in capital sentencing.

ARGUMENT

I

THE COURT OF APPEALS WAS CORRECT
IN MAKING AN INDEPENDENT DETER-
MINATION OF THE RESPONDENT'S CLAIM
THAT HE WAS DEPRIVED OF THE
EFFECTIVE ASSISTANCE OF COUNSEL
UNDER THE SIXTH AMENDMENT

Petitioners raise a threshold contention that the federal court should have accorded presumptive validity to the state court determination that the respondent was not deprived of the effective assistance of counsel. [Pet. Br. 84]. Petitioners are seriously mistaken in their view that the federal courts were bound by the state court findings.

First, the state court determination regarding counsel's effectiveness is not a presumptively correct finding of fact under 28 U.S.C. §2254(d). Section 2254(d) applies only to "basic, primary, or historical facts." Townsend v. Sain, 372 U.S. 293, 309 n. 6 (1963), (quoting Brown v. Allen, 344

U.S. 443, 506 (1953) (opinion of Frankfurter, J.)). In contrast, the issue of whether counsel's representation violated the Sixth Amendment involves "a legal standard, by definition normative and prescriptive, which must be applied to a particular set of facts." Walker v. Cardwell, 476 F.2d 213, 216 (5th Cir. 1973); Adams v. Jago, 703 F.2d 970, 978 (6th Cir. 1983). Thus, the resolution of whether a person has been denied the effective assistance of counsel is a mixed determination of law and fact that "is open to review on collateral attack in a federal court." Cuyler v. Sullivan, 446 U.S. 335, 342 (1980). Cf. Marshall v. Lonberger, ___ U.S. ___, 103 S.Ct. 843, 849 (1983); Brewer v. Williams, 430 U.S. 387, 403-04 (1977).

Second, it is well-settled that the federal courts have a clear, independent responsibility to decide such questions of

federal constitutional law,¹⁷ without being bound by the state court's decision. Summer v. Mata, 455 U.S. 591, 597 (1982); Brown v. Allen, 344 U.S. 443, 458-59 (1953). See also, Wainwright v. Sykes, 433 U.S. 72, 87 (1977). Consequently, the federal courts were correct in making an independent determination of the respondent's claim that he was deprived of the effective assistance of counsel guaranteed by the Sixth Amendment.

17/ The conclusion to be drawn from the record in the present case regarding the effectiveness of counsel's representation is purely legal in nature and does not involve the resolution of any factual determinations or matters of credibility, since the state courts did not conduct any evidentiary hearing where facts were in conflict or credibility at issue. Compare, Maggio v. Fulford, ___ U.S. ___, 103 S.Ct. 2261, 2262 (1981). The absence of any development in the state court of the pertinent facts regarding counsel's actions outside of the courtroom also required the district court to conduct an evidentiary hearing pursuant to the mandate of Townsend v. Sain, 372 U.S. 293 (1963). See also, Machibroda v. United States, 368 U.S. 487, 494-95 (1962). Petitioners' argument that such a hearing was not necessary or appropriate [Pet. Br. 57, 62] is plainly without merit.

II

A CLAIM OF INEFFECTIVE ASSISTANCE IS MADE WHEN A DEFENDANT SHOWS: (1) THAT HE DID NOT RECEIVE REPRESENTATION WITHIN THE RANGE OF COMPETENCE DEMANDED OF ATTORNEYS IN CRIMINAL CASES AND (2) THAT COUNSEL'S FAILINGS IMPAIRED THE PRESENTATION OF HIS DEFENSE WITHOUT REGARD TO WHETHER THE OUT-COME WOULD NECESSARILY HAVE BEEN DIFFERENT

The en banc court of appeals reached the correct result on the merits. We do not, however, support all of the en banc court's reasoning. As suggested below, the en banc court's rigid, categorical approach to the issue of counsel's duty to investigate is neither necessary nor helpful, and creates further complications in an area that is already less than clear. In addition, the en banc court's standard of prejudice is less satisfactory than that followed by several circuits and adopted in substantial part by the panel. We therefore set forth the Sixth Amendment principles that we believe should govern this case. In the course of this presenta-

tion, we will encounter and dismiss at the threshold petitioners' arguments, which essentially ask the Court to eviscerate the Sixth Amendment and disincorporate its provisions from the Fourteenth Amendment.

A. The Sixth Amendment is Violated By Representation That Falls Outside The Range of Competence Demanded of Attorneys in Criminal Cases

The Sixth Amendment to the Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.¹⁸ The Court has frequently emphasized the "fundamental" nature of this constitutional provision, Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963), since "[t]he assistance of

^{18/} This right is secured for defendants in state as well as in federal criminal proceedings. Gideon v. Wainwright, 372 U.S. 335 (1963). Gideon signalled a sharp departure from the Court's analysis of the right to counsel in state proceedings solely under the Fourteenth Amendment's Due Process Clause. Betts v. Brady, 316 U.S. 455 (1942).

counsel is often a requisite to the very existence of a fair trial." Argersinger v. Hamlin, 407 U.S. 25, 31 (1972). See, e.g., Cuyler v. Sullivan, 446 U.S. at 344; Johnson v. Zerbst, 304 U.S. 458, 462 (1938); Powell v. Alabama, 387 U.S. 45, 67 (1932).

The theme of the Court's Sixth Amendment decisions is that a lawyer is a precondition to a fair trial,¹⁹ not simply one element of a fair trial. Cuyler, 446 U.S. at 443-44. Therefore, the petitioners are wrong in contending that the issue in this case is solely one of fundamental fairness under the Due Process Clause. [Pet. Br. 16].

Indeed, the petitioners are doing nothing less than inviting the Court to resurrect the analysis of Betts v. Brady, supra,

^{19/} The fundamental nature of this constitutional guarantee is reflected in the Court's view that the assistance of counsel is one of the "rights so basic to a fair trial that their infraction can never be treated as harmless error." Chapman v. California, 386 U.S. 18, 23 n. 8 (1967).

a decision repudiated in Gideon as "an anachronism when handed down." 372 U.S. at 345. Developments since Gideon firmly establish that vindication of the right to counsel is not dependent upon whether the proceeding is characterized as fundamentally unfair, compare United States v. Wade, 388 U.S. 218 (1967) (Sixth Amendment right to counsel) with Stovall v. Denno, 388 U.S. 293 (1967) (Due Process Clause), but on whether inadequate counsel violated the accused's Sixth Amendment rights.²⁰

Furthermore, the reversion to Betts v.

20/ Smithburn and Springmann, Effective Assistance of Counsel: In Quest of A Uniform Standard of Review, 17 Wake Forest L. Rev. 497, 503 (1981); Cooper v. Fitzharris, 586 F.2d 1325, 1329 (9th Cir. 1978) (en banc), cert. denied, 446 U.S. 974 (1979). See also Moore v. United States, 432 F.2d 730, 737 (3rd Cir. 1970) (en banc). For these reasons, petitioners' reliance on a variety of cases decided under the Due Process Clause -- United States v. Agurs, 427 U.S. 97 (1976); Smith v. Phillips, 455 U.S. 209 (1982); Cupp v. McNaughten, 414 U.S. 141 (1973) -- is misplaced. [Pet. Br. 91-94].

Brady, would, as petitioners candidly concede, [Pet. Br. 77], thrust federal courts into the morass of the "farce and mockery" test, a quagmire the Court clearly sought to avoid in formulating an objective standard of effectiveness under the Sixth Amendment in McMann v. Richardson, 397 U.S. 759, 771 (1970). See also Tollett v. Henderson, 411 U.S. 258, 266 (1973).²¹

The Court's decisions on the scope of review in collateral proceedings of trial errors to which no contemporaneous objection was made, upon which petitioners rely heavily [Pet. Br. 71-75, 87-94], provide no support for their contention. See,

^{21/} While many courts have followed the test in McMann, several state courts and the Second Circuit (see Appendix B), still adhere to the archaic "farce and mockery" approach derived from Betts. Comment, Defects In Ineffective Assistance Standard Used by State Courts, 50 U. Col. L. Rev. 389, 406 (1979). See also Comment, Effective Assistance of Counsel: A Constitutional Right in Transition, 10 Val. L. Rev. 509, 519 (1976).

e.g., Wainwright v. Sykes, 433 U.S. 72 (1977); Engle v. Isaac, 456 U.S. 107 (1982), and United States v. Prady, 456 U. S. 152 (1982) [Pet. Br. 71-75; 87-90]. None of these cases involves a challenge to the adequacy of counsel.²² To the contrary, all of the Court's procedural default cases assume the presence of competent counsel.²³ In these cases, the Court considered the circumstances under which courts on collateral

22/ In Wainwright v. Sykes, the prisoner had waived any allegation relating to ineffective assistance of counsel at his trial. Id., 433 U.S. at 75 n. 4, and the Court did not address this issue. 433 U.S. at 88 n. 12.

23/ In Wainwright v. Sykes, both Justices Stevens and White assumed the presence of competent counsel. Id., 433 U.S. at 96 (Stevens, J., concurring) ("[C]ompetent trial counsel could well have made a deliberate decision not to object to the admission of the respondent's in-custody statement"); id., 433 U.S. at 99 (White, J., concurring) (deliberate bypass unless record demonstrates that services of counsel were not "within the McMann reasonable competence standard"). See also United States v. Davis, 411 U.S. 233, 234 n. 1 (1973); Fay v. Noia, 372 U.S. 391, 439 (1963).

review would assess the merits of federal constitutional claims even though there had been procedural defaults by competent counsel in state or federal trial courts. The rationale of these cases is obviously irrelevant to ineffectiveness claims²⁴ and contains no hint of the bold extension sought by petitioners.²⁵

In short, the petitioners' proposed regression to Betts v. Brady and the "farce

24/ Note, A Functional Analysis of the Effective Assistance of Counsel, 80 Colum. L. Rev. 1053, 1060 n. 53 (1980). If anything, the Court's observation in Engle v. Isaac that "the Constitution guarantees criminal defendants only a fair trial and a competent attorney," 456 U.S. at 134 (emphasis added) belies the petitioners' contention that there is no distinct Sixth Amendment interest in the performance of counsel apart from whether a defendant received a fair trial.

25/ In fact, these decisions provide compelling reasons for ensuring representation by competent counsel, since federal constitutional rights could otherwise be forever waived through attorney error, neglect or indifference rather than as a consequence of the exercise of "reasonable professional judgment." Jones v. Barnes, ___ U.S. ___, 103 S.Ct. 3308, 3314 (1983).

and mockery" test is wholly at odds with the development of the Sixth Amendment guarantee in the Court.²⁶

1. The Basic Functions of Counsel in Criminal Proceedings Have Been Conceived and Developed in The Right to Counsel Cases Decided By The Court Under The Sixth Amendment

The principal functions of counsel in the criminal process have been established by the Court in right to counsel cases. The repeated theme of these decisions is that counsel serves "as a guide through complex legal technicalities"

26/ One final assertion by petitioners need only be briefly mentioned. Respondent is not challenging the substantive propriety of his death sentence. [Pet. Br. 62-63]. Every court -- state and federal -- that has reviewed this case has recognized that the focus of respondent's claims is on deficiencies in the sentencing proceedings as a consequence of inadequate counsel. This is clearly a proper challenge to a death sentence in federal court: "[T]he defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." Gardner v. Florida, 430 U.S. 349, 358 (1977) (emphasis added). See also, Townsend v. Sain, 334 U.S. 728, 741 (1948).

for the lay person, United States v. Ash, 413 U.S. 300, 307 (1973), and as a counterweight in the adversary system to the creation of a professional prosecuting official. Id. at 309.

The "guiding hand of counsel" is imperative to assist the accused layperson in understanding the nature of his case. As Justice Sutherland recognized in Powell v. Alabama:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one."

See also Geders v. United States, 425 U.S. 80, 88 (1970); Tomkins v. State of Missouri,

323 U.S. 485, 489 (1945); Williams v. Kaiser, 323 U.S. 471, 475-76 (1945); Johnson v. Zerbst, 304 U.S. at 463.

Counsel enables the accused to assess the charges and potential defenses so that the defendant may intelligently understand the options available to him. Hamilton v. Alabama, 368 U.S. 52, 55 (1961). Counsel does so by applying a specialized ability to integrate a knowledge of the law with an assessment of the relevant facts to determine how the accused can best present his defense. Counsel also protects the accused against an erroneous or improper prosecution by vigorously examining witnesses, probing for evidence, developing facts, making legal arguments and generally requiring that the prosecution be put to its legal proof. Coleman v. Alabama, 399 U.S. 1, 9 (1970). To protect the accused adequately, "the guiding hand of counsel" must be available "at every step in the proceedings against

him." Powell v. Alabama, 287 U.S. at 69.
See also Estelle v. Smith, 451 U.S. 454,
471 (1981); Coleman v. Alabama, 399 U.S. at
7; United States v. Wade, 388 U.S. at
224-226.

Consequently, counsel is not a supplement to other constitutional rights; he is an indispensable figure charged with ensuring that all other constitutional and procedural protections afforded the accused are fully preserved. The right to counsel is sui generis; "there is no right more essential than the right to assistance of counsel . . ." Lakeside v. Oregon, 453 U.S. 333, 341 (1978), because "it affects [an accused person's] ability to assert any other rights he might have." Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956).

Besides performing an essential role for the accused, defense counsel's participation in the criminal process is criti-

cal to the integrity and fairness of the adversary system. Brewer v. Williams, 430 U.S. 387, 398 (1977); United States v. Morrison, 449 U.S. 361, 364 (1981). The adversary system assumes the presence and active involvement of three participants -- the judge, prosecutor and defense counsel -- who will discharge their respective responsibilities conscientiously and effectively.²⁷ United States v. Ash, 413 U.S. at 309. See also Johnson v. Zerbst, 304 U.S. at 462; Gideon v. Wainwright, 372 U.S. at 344. Partisan advocacy by defense counsel and the prosecutor

27/ The Chief Justice has metaphorically compared the criminal justice system to a tripod with the court, the prosecutor and defense counsel as the legs. Inadequate legal representation for a criminal defendant severely impairs this system by effectively removing one of the legs. Proceedings At The 1969 Judicial Conference, United States Court of Appeals (Tenth Circuit), 49 F.R.D. 347, 359 (1969). See also ABA Project On Standards For Criminal Justice, Standard § 1 Relating to the Defense Function, 4-1.1(a) (2d. ed 1980).

serves to promote the fact-finding objectives that are necessary to proper determinations in the adversary system. Herring v. New York, 422 U.S. 853, 862 (1975).

See also Polk County v. Dodson, 454 U.S. 312, 318 (1981); United States v. Nobles, 422 U.S. 225, 230 (1975).

In sum, the dual functions of counsel underscore the critical role of the effective assistance of counsel in the criminal process. As we show below, they also suggest the standards by which claims of ineffective assistance should be determined.

2. Effective Counsel Must Discharge Certain Basic Duties That Derive Directly From the Functions He Fulfills in the Criminal Process

At the outset, we note the parameters established by the decisions of the circuits and the implications of the Court's Sixth Amendment cases. On one hand, the basic purposes of the Sixth Amendment guarantee of counsel must require more

than the mere formal appointment or physical presence of counsel. See Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978); Avery v. Alabama, 308 U.S. 444, 446 (1940); White v. Ragen, 324 U.S. 760 (1945); Powell v. Alabama, supra.²⁸

On the other hand, the Constitution does not require errorless counsel, Parker v. North Carolina, 397 U.S. 790, 797 (1970); McMann v. Richardson, 397 U.S. at 771, nor does it compel counsel to recognize and raise every conceivable claim or defense. Engle v. Isaac, 456 U.S. at 134. "[C]ounsel for a criminal defendant is not required to pursue every path until it bears fruit or until all conceivable hope withers." Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980). Rather, counsel must provide assistance "within the range

28/ Comment, Ineffective Representation As A Basis For Relief From Conviction: Principles For Appellate Review, 13 Colum. L.J. and Soc. Pr. 1, 7 (1977).

of competence demanded of attorneys in criminal case." McMann v. Richardson, 397 U.S. at 771.²⁹ Accord Tollett v. Henderson, 411 U.S. 258, 266 (1973). This encompasses the level of competency provided by attorneys with knowledge, skill, judgment and diligence in the sound practice of criminal law. See also Cooper v. Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979); Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) (en banc).

Thus far, the Court has not fleshed out the details of that responsibility;

29/ In McMann, the Court did not describe the standard in any more detail, preferring to leave its development "to the good sense and discretion of the trial courts." Id. at 771. With the exception of the Second Circuit, which still adheres to a "farce and mockery" test, the courts of appeal have uniformly adopted an objective standard for assessing counsel's performance that is identical or similar to that announced in McMann. The standards in each circuit are set forth in Appendix B.

it has not formulated any list of specific duties for determining whether counsel has been reasonably competent. Nor in respondent's view would it be necessary or wise to do so. To implement an exhaustive list of categorial rules, as the en banc court attempted, would not provide sufficient guidance for the state and federal courts that must apply the Sixth Amendment guarantee in a wide variety of factual settings. The rules would of necessity be imprecise, and would divert the courts from the principal inquiry: whether the actions or inactions of counsel in a particular case were that which a reasonably competent lawyer, faced with similar circumstances, would have undertaken. See Washington v. Watkins, 655 F.2d 1346, 1356 (5th Cir. 1981). Rather, courts should retain the discretion to utilize a broad range of sources, including the American Bar Association (ABA) Model Rules of Professional

Conduct,³⁰ or the ABA Standards for Criminal Justice (2d. ed 1980),³¹ prece-

30/ See Jones v. Barnes, 103 S.Ct. at 3313 n. 6; Cuyler v. Sullivan, 446 U.S. at 346 n. 11.

31/ Although these standards do not define minimal constitutional criteria, Jones v. Barnes, 103 S.Ct. at 3313 n. 6, the Court has frequently noted their relevance in assessing the responsibilities of defense counsel under the Sixth Amendment. Id., 103 S.Ct. at 3312. Holloway v. Arkansas, 435 U.S. at 486 n. 9; Cuyler v. Sullivan, 446 U.S. at 346 n. 11. In contrast, some courts have adopted specific obligations for defense counsel, many of which are drawn from these standards. See, e.g., State v. Perez, 98 Idaho 181, 184, 579 P.2d 127, 129 (1975); State v. Hester, 45 Ohio St.2d 71, 79, 341 N.E. 2d 304, 310 (1976); Baxter v. Rose, 523 S.W. 2d 930, 936 (Tenn. 1975); State v. Harper, 57 Wis. 2d 543, 557, 205 N.W. 2d 1, 9 (1973); Marzullo v. State of Maryland, 561 F.2d 540, 544 (4th Cir. 1977).

Several commentators have urged the adoption of these or other precise criteria to measure counsel's performance under the Sixth Amendment. See, e.g., Levine, Toward Competent Counsel, 13 Rutgers L. Rev. 227 (1982); Erickson, Standards Of Competency For Defense Counsel In A Criminal Case, 17 Am. Crim. L. Rev. 233 (1980); Smithburn and Springmann, supra n. 20; Lasater, The Role of Harm in Effective Assistance of Counsel Cases: Procedure and Policy, 32 Syracuse L. Rev. 759 (1981).

dent from state and federal courts, expert testimony, and other information that could assist in the objective determination of the normal range of competency of attorneys in criminal cases.

What the Court's precedents do indicate, however, is that the Sixth Amendment guarantee requires counsel to discharge certain basic responsibilities in every criminal proceeding. It is against these responsibilities that counsel's competence and effectiveness must be measured.

First, as the Solicitor General concedes [S.B. 13], counsel must give "[u]n-divided allegiance and faithful, devoted service to a client." VonMoltke v. Gillies, 332 U.S. 708, 725 (1945) (plurality opinion). See also Ferri v. Ackermann, 444 U.S. 193, 204 (1979); Cuyler v. Sullivan, supra; Holloway v. Arkansas, supra. While there is no guarantee of a "'meaningful relationship' between an accused and

his counsel," Morris v. Slappy, ___ U.S. ___, 103 S.Ct. 1610, 1617 (1983), the Sixth Amendment still requires an attorney to pursue the defense as "an active advocate in behalf of his client." Anders v. California, 386 U.S. 738, 744 (1967). See also Entsminger v. Iowa, 386 U.S. 748, 75 (1967). Therefore, responsible, competent counsel must be an advocate, devoted to serving his client's interests vigorously in an adversary proceeding.³²

³²/ Commentators have recognized the threat to the adversary system posed by ineffective defense counsel. See, e.g., Note, Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. DeCoster, 93 Harv. L. Rev. 752, 767 (1980); Schwarzer, Dealing With Incompetent Counsel: The Trial Judge's Role, 93 Harv. L. Rev. 633, 637 (1980) (Adversary process ceases to function when lawyers are not competent); Comment, A Standard For The Effective Assistance of Counsel, 14 Wake Forest L. Rev. 175, 193 (1978); Comment, Effective Assistance of Counsel: A Constitutional Right In Transition, 10 Val. L. Rev. 509, 528-29 (1976); Finer, Ineffective Assistance of Counsel, 58 Cornell L. Rev. 1077, 1116 (1973).

Second, counsel must bring an informed grasp of the facts and law to his decision-making on the wide range of issues confronting the accused. The "reasonably competent advice" demanded of counsel by McMann v. Richardson,³³ 397 U.S. at 770, is the keystone of effective assistance, "lest the accused concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which [he] in fact and in law committed." Tompkins v. State of Missouri, 323 U.S. at 489. The accused is effectively deprived

33/ Petitioners miss the point of McMann in suggesting that the obligations of counsel set forth in that decision are limited to guilty plea cases. [Pet. Br. 78-79; 82-83]. The decision is not limited by its terms to guilty plea cases nor is there any sound constitutional or logical reason for assessing counsel's adequacy under a different standard when the defendant goes to trial. The teaching of McMann is that reasonably competent advice is a precondition to the "guiding hand" role of counsel at all stages of the criminal process.

of the "guiding hand" of counsel unless counsel provides the defendant with advice predicated on a basic understanding of the application of the law to the relevant facts.

Third, it necessarily follows from counsel's role as advisor and "guiding hand" that an attorney "must make an independent examination of the facts, circumstances, pleadings and laws involved" in order to be in the position to exercise sound professional judgment for the accused. Van Moltke v. Gillies, 322 U.S. at 721; Powell v. Alabama, 287 U.S. at 57. See also Brewer v. Williams, 430 U.S. 387, 398 (1977); Tollett v. Henderson, 411 U.S. at 266-67. The consensus of the circuits on this point is well-expressed in Moore v. United States, 472 F.2d at 735:

The careful investigation of a case and the thoughtful analysis of the information it yields may disclose evidence of which even the defendant is unaware and may suggest issues

and tactics at trial which would otherwise not emerge.³⁴

Without preparation to unearth the factual bases of the case, counsel cannot "act as a spokesman for, or advisor to, the accused," United States v. Ash, 413 U.S. at 312 or "protect [him] from conviction resulting from his own ignorance of his legal and constitutional rights." Johnson v. Zerbst, 304 U.S. at 465. Gaines v. Hopper, 575 F.2d 1147, 1149-50 (5th Cir. 1978). Without adequate investigation, counsel is

34/ Moore and numerous other decisions in the circuits explicitly state what McMann strongly intimates -- the Sixth Amendment guarantee requires an attorney to obtain "the legal and factual information he needs to appreciate the decisions he must make." Tague, The Attempt To Improve Criminal Defense Representation, 15 Am. Crim. L. Rev. 109, 116-17 (1977). See, e.g., Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 1798 (1983); Wood v. Zahradnick, 578 F.2d 980, 982 (4th Cir. 1978); Wolfs v. Britton, 509 F.2d 304, 309 (8th Cir. 1975); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974). See also Schwarzer, *supra*, note 31, at 654 (Adequate preparation lies at the heart of a competent trial performance).

little more than a companion for the hapless layperson as he wanders through the intricacies of a criminal trial to a fore-ordained result.³⁵

For these reasons, the assumption of the en banc court that, in certain instances, counsel can make a reasonable choice among alternative strategies without conducting an adequate investigation is inconsistent with

35/ As the Fifth Circuit aptly observed:

[A]ny experienced trial lawyer knows that a purported trial without adequate preparation amounts to no trial at all. Brooks v. Texas, 381 F.2d 619, 625 (5th Cir. 1967).

See also McQueen v. Swenson, 493 F.2d 207, 215-16 (8th Cir. 1974).

The adequacy of counsel's investigation in particular circumstances must turn on the specific facts of the case and does not lend itself to the categorical rules that the en banc court of appeals sought to formulate. The scope of investigation will vary according to the nature of the prosecution's case, the seriousness of the charges, the complexity of the issues and the extent of the colorable defenses to the charges. Washington v. Watkins, 655 F.2d at 1356; United States v. Tucker, 716 F.2d 576, 584 (9th Cir. 1983).

Sixth Amendment principles. [Pet. App. 53-54]. This assumption is squarely at odds with Powell v. Alabama, 287 U.S. at 58, and Von Moltke v. Gilles, 322 U.S. at 721, both of which indicate that a reasonable investigation is the prerequisite to an informed tactical decision. "Strategic" decisions of an attorney without reasonable investigation and preparation of the pertinent facts and law amount to nothing more than uninformed speculation.³⁶

A court cannot, and should not, conjure up a meaningful tactical judgment or strategic choice by a lawyer who is too factu-

36/ See ABA Project on Standards for Criminal Justice, Standards Relating to the Defense Function 4-4.1(2d ed. 1980) (Duty To Investigate); Note, Effective Assistance of Counsel For The Indigent Defendant, 78 Harv. L. Rev. 1434, 1439 (1965) (Competent decision to omit a possible defense assumes adequate knowledge of the potential of the defense, which usually depends upon investigation); Schwarzer, supra, note 31, at page 656 (Only after an adequate investigation of leads for clearly indicated defenses can counsel advise his client properly and make the required tactical decisions).

ally uninformed to make a competent decision. Nor should a habeas petitioner have to negate the possibility that a demonstrable failure to conduct an adequate investigation into the relevant law or facts was a strategic or tactical decision. "[T]he crucial inquiry is not whether appellate judges can imagine an argument to justify counsel's decision, but whether the record indicates that the attorney was aware of the problem, considered the alternatives, and made a reasonable choice of the best course of action."³⁷ If he did not, then the failure to investigate and prepare can only be attributable to neglect or ignorance of the accused's interests, and the defendant has been effectively deprived of the assistance of counsel guaranteed by the Sixth

³⁷/ Comment, Ineffective Representation As A Basis for Relief From Conviction: Principles for Appellate Review, 13 Colum. L. Rev. and Soc. Pr. 1, 20 (1977).

Amendment.³⁸ Pickens v. Lockhart, 714
F.2d 1455, 1467 (8th Cir. 1983).

3. Adequate Performance Of The Basic
Duties of Reasonably Competent
Counsel Is Critical To The Relia-
bility Of Capital Sentencing
Determinations

The basic duties of reasonably compe-
tent counsel described above must be dis-
charged at sentencing as well as at trial.
Gardner v. Florida, 430 U.S. 349, 358
(1977). Because of the critical nature of
the sentencing determination, counsel's

38/ The relative wisdom of counsel's deci-
sions after adequate investigation need not
be open to review under this standard; the
only pertinent inquiry is whether defense
counsel had a tactical or strategic justifi-
cation that "reasonably competent, fairly
experienced attorneys might agree with or
find reasonably debatable." Finer, supra,
note 31, at 1080. See also Beasley v.
United States, 491 F.2d 687, 696 (6th Cir.
1974). The production of this evidence
would place a minimal burden on the State,
since the trial counsel "may be unwilling to
cooperate with present counsel" and is "much
more likely to cooperate and consult with
counsel for the State, whose object at the
hearing will be to vindicate his conduct."
Stanley v. Zant, 697 F.2d 955, 974 (5th Cir.
1983) (Arnold, J., dissenting).

assistance is essential "in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence." Mempa v. Rhay, 389 U.S. 128, 135 (1967). Accord Gardner, 430 U.S. at 360; Moore v. Michigan, 355 U.S. at 155, 160 (1957).³⁹ Effective assistance must include zealous advocacy and an informed grasp of the law and facts pertinent to the sentencing issues, based on an adequate investigation. Cf. Von Moltke v. Gillies, 332 U.S. at 721.⁴⁰

39/ See also United States v. Pinkney, 543 F.2d 908, 914 (D.C. Cir. 1976); Mason v. Balkcom, 531 F.2d 717, 723 (5th Cir. 1976); ABA Project on Standards For Criminal Justice, Standards Relating To The Defense Function, 4-7.10 (Post-trial motions); 4-8.1 (Sentencing) (2d Ed. 1980).

40/ The drafters of the ABA Standards have similarly emphasized the critical need for counsel to conduct an independent investigation for sentencing:

The lawyer also has a substantial

(footnote continues on following page)

Adequate performance of these basic functions is nowhere more crucial than in

40/ continued

and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant. Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions." Id. at 4-55.

Other commentators repeatedly stress the need for careful investigation of mitigating information for a sentencing hearing. See, e.g., Dash, The Defense Lawyer's Role At The Sentencing Stage of A Criminal Case, 54 F.R.D. 315, 316 (1972) (In order to provide effective assistance to his client, the lawyer must be prepared to present to the court the most favorable facts relating to his client's life history, employment record and, where appropriate, his potential and prospects for rehabilitation). See also Comment, Adequacy of a Criminal Defense Lawyer's Preparation For Sentencing, 1981 Ariz. St. L. J. 585, 608 (Investigation should encompass interviews with the client and with those who know him best, a diligent search for mitigating information and inquiry into available programs for rehabilitation).

capital sentencing proceedings, where vigorous advocacy and investigation are indispensable to the proper fulfillment of the central purpose of a valid capital sentencing scheme -- the individualized determination of life or death on the basis of the character and background of the individual and the circumstances of the particular offense.

Zant v. Stephens, ___ U.S. ___, 102 S.Ct. 2733, 2744 (1983); accord California v. Ramos, ___ U.S. ___, 103 S.Ct. 3446, 3452-3453 (1983); Barclay v. Florida, ___ U.S. ___, 103 S. Ct. 3418, 3423 (plurality opinion); Eddings v. Oklahoma, 455 U.S. 104, 111-12 (1982); Woodson v. North Carolina, 428 U.S. 220, 304 (1976).⁴¹ To ensure that informed decisions are made as to whether a person should live or die, it is essential that the sentencer "have before it all pos-

41/ See generally Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L. Rev. 299, 323-25 (1983).

sible relevant information about the individual defendant whose fate it must determine". Jurek v. Texas, 428 U.S. 273, 276 (1976).⁴²

Counsel is certainly in no position to assist the defendant or the sentencer in understanding the unique issues at stake in a capital sentencing hearing unless there has been an adequate investigation into potential mitigating information about the client's individual circumstances and background.⁴³ Only after an investigation of all available mitigating circumstances can counsel make an informed decision about what

42/ Goodpaster, supra note 41, at 319:

Where potentially beneficial mitigating evidence exists and counsel has not presented it, counsel has precluded the sentencer from considering mitigating factors. Through failure to discover or present such evidence, counsel has "create[d] the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. (quoting from Lockett v. Ohio, 438 U.S. 586, 605 (1978)).

43/ Goodpaster, supra note 42, at 344.

evidence should be presented to make a convincing case for sparing the defendant's life. Pickens v. Lockhart, 714 F.2d at 1467.

B. Relief Should Be Granted To A Defendant Who Demonstrates That Counsel's Serious Derelictions Impaired The Presentation Of The Defense, Though Not Necessarily The Outcome of the Trial

In requiring a showing of prejudice but rejecting the outcome-determinative test of DeCoster III, the en banc court acted in a manner consistent with the Sixth Amendment principles discussed above. While the Court has not yet addressed the prejudice question in this context,⁴⁴ it has indicated that

44/ Petitioners rely on Chambers v. Maroney, 399 U.S. 42, 53-54 (1970) to support a requirement that the defendant show an effect on the outcome of the proceeding [Pet. Br. at 93]. However, the Court did not squarely confront the issue in that case. At that time, the Third Circuit rule was "that the belated appointment of counsel is inherently prejudicial and makes out a prima facie case of denial of effective counsel, with the burden of proving absence of prejudice shifted to the prosecuting

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only those violations that have "had [an] adverse impact upon the criminal proceedings" warrant relief under the Sixth Amendment.

United States v. Morrison, 449 U.S. 361, 367 (1981); cf. Avery v. Alabama, 308 U.S. at 452.⁴⁵ The en banc court erred, however, in adopting the "actual and substantial pre-

44/ continued

authorities." United States ex rel. Chambers v. Maroney, 408 F.2d 1186, 1189-90 (3d Cir. 1969). Consistent with this analysis, the court of appeals determined that the presumption of prejudice was sufficiently rebutted by the State, id. at 1195, a determination that was affirmed by this Court. Therefore, it defies reason for petitioners to suggest [Pet. Br. 93] that Chambers tacitly determined the degree of prejudice in ineffective assistance cases in a manner at odds with the court of appeals decision that this Court affirmed. Indeed, Chambers has been interpreted as standing solely for the proposition that the late appointment of counsel is not per se prejudicial. See, e.g., Cooper v. Fitzharris, 586 F.2d at 1331.

45/ With the exception of the Fourth and Sixth Circuits, every court of appeals requires the petitioner to bear the burden of showing some impairment to the presentation of the defense resulting from counsel's errors. (Appendix C). A substantial number of state jurisdictions require a defendant to demonstrate prejudice. Erickson, supra, note 32, 17 Am Cr. L. Rev. at 249 n. 137.

judice" formulation of United States v. Frady, 456 U.S. at 170, because this standard is foreign to -- indeed, in conflict with -- basic Sixth Amendment principles.

1. Relief Should Be Granted To A Habeas Petitioner Who Demonstrates That Counsel's Serious Derelictions Impaired The Presentation Of His Defense, Though Not Necessarily The Outcome Of His Trial

Virtually without exception, the circuits' decisions support the adoption of a standard of prejudice that focuses on whether counsel's derelictions had an adverse impact on the presentation of the defense, and the rejection of a test that inquires into whether the result would have been altered in the absence of inadequate counsel.⁴⁶

^{46/} It is noteworthy that most commentators, while differing over the proper methodology for analyzing claims of ineffective counsel, reject the outcome-determinative test as inconsistent with Sixth Amendment principles. See, e.g., Note, A New Focus On Prejudice In Ineffective Assistance of Counsel Cases: The Assertion Of Rights Standard, 21 Am.

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Respondent will first explore why an outcome-determinative test is unacceptable and will then explain why a standard of prejudice that focuses on impairment to the defense is more closely attuned to basic Sixth Amendment principles.

46/ continued

Crim. L. Rev. 29 (1983) (proposing an assertion of rights standard that requires counsel to assert adequately all pertinent rights of the defendant); Comment, A Coherent Approach To Ineffective Assistance of Counsel Claims, 71 Cal. L. Rev. 1516 (1983) (proposing a "net diminution" analysis which measures prejudice by whether there has been a net diminution in the quality of the attorney's performance); Smithburn and Springmann, supra, 17 Wake Forest L. Rev. 497 (proposing the development of uniform guidelines for assessing ineffective assistance of counsel claims); Lasater, The Role of Harm In Ineffective Assistance of Counsel Cases: Procedure and Policy, 32 Syracuse L. Rev. 759 (1981) (proposing the development of an objective set of guidelines describing in detail the duties owed by defense counsel); Erickson, supra n.30, 17 Amer. Crim. L. Rev. at 250 n.143; Finer, supra n.31, 58 Cornell L. Rev. 1104, 1105 n.160 and accompanying text; Note, A Functional Analysis of the Effective Assistance of Counsel, 80 Colum. L. Rev. 1053 (1980) (evaluates ineffective representation in terms of the potential of substantial prejudice to the various interests protected by the right to counsel).

- a. The court of appeals correctly rejected an outcome-determinative standard of prejudice

The court of appeals properly concluded that an outcome-determinative test places an untoward burden on a habeas petitioner.

[Pet. App. 70-73]. This test also imposes a host of inappropriate and burdensome responsibilities on the federal courts and is inconsistent with the fundamental values underlying the Sixth Amendment.

First, it is evident that a focus on outcome will require federal courts to retry issues of guilt and penalty, inevitably forcing judges to trespass "upon what properly would have been the jury's province in weighing the truth or falsity of the evidence at the original trial." McQueen v. Swenson, 498 F.2d at 220. This inquiry therefore risks substituting the judgment of federal courts on the evidence and its weight or bearing on guilt and sentence for that of a properly informed state trial

judge or jury. Field, Assessing the Harmlessness of Federal Constitutional Error -- A Process In Need Of A Rationale, 125 U. Pa. L. Rev. 15, 33-34 (1976); Saltzburg, The Harm of Harmless Error, 59 Va. L. Rev. 988 1020 (1973); R. Traynor, The Riddle of Harmless Error, 18, 29 (1970).

Second, such an inquiry is not only improper, but also highly speculative. A federal judge must necessarily conjecture about how a judge or jury might have reacted to certain evidence or testimony. United States v. Tucker, 716 F.2d at 589. Cf. Traynor, supra, at page 23. While a trial court or jury before whom the witnesses appear is in a position to evaluate the numerous factors that affect the probative value of testimony, a court reviewing the cold, written record has no way of doing so. Traynor, supra, at page 30.

This speculation reaches particularly unacceptable levels when counsel's failings

have resulted in an impoverished record. When counsel has failed to investigate and prepare, it is unfair if not impossible to assess the impact that later unearthed information, first presented in habeas corpus hearings, would have had on the decision maker in the original proceedings. Cf. Holloway v. Arkansas, 435 U.S. at 590-91; Schwarzer, supra n. 31, 93 Harv. L. Rev. at 642-43.

A reviewing court simply cannot reconstruct a criminal trial from portions of different records and determine with any degree of confidence how that hybrid proceeding would have been viewed by the first trier of fact. The reviewing court has seen only some witnesses, while the original trier has seen others. No one is in a position to resolve credibility conflicts or inconsistencies between these records. Moreover, the weight, value, and impact of particular evidence

or testimony is colored and shaped by the context and manner of its presentation. Not only might a previously elicited fact have looked different to the original trier in light of the new evidence, but also the reviewing court cannot ascertain how the full record would have been perceived had it been developed and structured by competent, effective counsel. Cf. Moore v. United States, 432 F.2d at 735.

To admit that a conviction or sentence was the result of a breakdown in the process, but then to make relief turn upon a guess as to how that process might have functioned with effective counsel is to trivialize the central importance of the guarantee of adequate counsel to the proper functioning of the adversary process.

Third, the subjective and conjectural inquiries implicit in decisions based on the outcome-determinative test will necessarily prevent any principled consistency in

determinations of effective assistance and will fail to provide sufficient guidance to conscientious counsel or reviewing courts. The unguided guesses of a district judge about what a state-court decision maker would have done if different evidence had been considered is hardly likely to be much illuminated or regulated by an array of particularistic opinions of appellate judges engaging in the same kind of guesswork. Cf. Field, supra, 125 U. Pa. L. Rev. at 36. This entire process does not approach the kind of "intelligent evenhanded application," Holloway v. Arkansas, 435 U.S. at 491, that is so essential for the elucidation of proper standards of attorney performance under the Sixth Amendment.

Fourth, an outcome-determinative test is unduly burdensome on the federal courts. In order accurately to assess the effect of counsel's failings on the outcome, a federal judge must evaluate the relative credibility

of various witnesses (which cannot be done without observing their demeanor), and consider the strength of the physical or documentary evidence (which cannot be done without examining it in full). An outcome-determinative test would compel the parties to present the case anew, without counsel's errors or omissions, in order to ensure a reliable decision as to what the proper outcome ought to be but for counsel's ineffectiveness. The burden on the federal courts would be inordinate.

The outcome-determinative standard is particularly inappropriate when claims of ineffective representation at capital sentencing proceedings are involved. Not only does a focus on result fail to ensure adequate protection of the defendant's legitimate interest in the character of a capital sentencing scheme, Gardner v. Florida, 430 U.S. at 358, but also it does not take into account the discretionary and highly sensi-

tive nature of the capital sentencing decision. Whereas one judge or juror may consider the defendant's character and background insufficient to mitigate a murder, another judge or juror could easily come to the opposite conclusion. Sentencing always involves "a large area of discretion and doubts." Carter v. Illinois, 392 U.S. 173, 178 (1946); United States v. Grayson, 438 U.S. 41, 48 (1978). Even under the guidelines provided by constitutional capital punishment statutes, there is the opportunity for a considerable amount of discretion informed by a wide variety of factors, both statutory and nonstatutory. Indeed, just last Term, the Court emphasized that the capital sentencing process is not "a rigid and mechanical parsing of statutory . . . factors," but that "[i]t is entirely fitting for the moral, factual, and legal judgment of judges and jurors to play a meaningful role in sentencing." Barclay v. Florida,

103 S.Ct at 3424; id. at 3435 (Stevens, J., concurring). The outcome-determinative standard will require the federal courts to engage in fine-spun speculation on how a sentencer would exercise that judgment when faced with new information in mitigation that inadequate counsel failed to uncover.

Furthermore, the application of an outcome-oriented test to capital sentencing proceedings will impose substantial burdens upon the federal courts. In order to meet the exacting requirements of reliability in the determination that death is the appropriate punishment in a particular case, Woodson v. North Carolina, 428 U.S. at 305, it is even more vital that the subtle influence and effects of live testimony be assessed, for these are the precise factors that often sway a sentencer to choose life over death. The habeas court could not rely on affidavits or depositions, for it would face the risk of basing conclusions about the merits

of a death sentence on a paper record. The sentencing hearing would have to be reconstructed -- together with the additional, originally-neglected evidence in mitigation -- in order to satisfy the district judge that the result would not have been different with adequate counsel.

Assuming that a record could somehow be satisfactorily recreated, the outcome-determinative standard would then require the federal district court to make substantive decisions on state capital sentencing issues. Under Florida law, the federal judge would have to engage in the weighing of aggravating and mitigating circumstances, a responsibility conferred by statute on state juries and judges. Fla. Stat. Ann. §921.141 3(b). This is hardly the sort of task that should be performed by a federal judge who would, of necessity, have to familiarize himself with the guidelines and interpretative nuances of state judicial

decisions on capital sentencing.

By forcing habeas courts to grapple with these substantive state sentencing concerns, the outcome-determinative test introduces other significant problems. For example, the district court below reached its own conclusion that respondent's proffered "character and medical testimony cannot reasonably be characterized as evidence of mental or emotional disturbance." [Pet. App. 286]. This conclusion is not supported by any findings that would explain it, nor is there any citation or reference to any Florida law that might have guided the district court in reaching that conclusion.⁴⁷ In the context of capital sentencing, the outcome-determinative test would convert habeas review into a standard-

^{47/} We will explain below that Florida courts have frequently found that nonstatutory factors about a defendant's mental state or background provide a basis for imposing a life rather than a death sentence [see note 61, infra].

less rehashing of the propriety of the death sentence in a particular case, inevitably leading to the arbitrary results condemned in Furman v. Georgia, 408 U.S. 238 (1972).

For these reasons, virtually every circuit that has adopted a test of prejudice within the framework of a reasonable competence standard has focused the inquiry solely on the impact of counsel's inadequacy upon the course of the proceedings rather than upon the conjectured outcome. Under this view, a requirement of prejudice "does not mean" that the reviewing court must weigh the evidence for itself and conclude that "the defendant would have been acquitted but for counsel's blunders." Cooper v. Fitzharris, 586 F.2d at 1333; Harris v. Housewright, 697 F.2d 202, 212 (8th Cir. 1982); United States ex rel. Green v. Rundle, 434 F.2d 1115-1116 (3rd Cir. 1970). It means instead that the court must determine whether the ineffective assistance had an

adverse impact on or created a "flaw in the adversary process," McQueen v. Swensen, 498 F.2d at 218-19.⁴⁸ So far as the federal

48/ Two circuits (the Fourth and Seventh) place a "harmless beyond a reasonable doubt" burden on the State. Wood v. Zahradnick, 578 F.2d 980, 982 (4th Cir. 1978); Wade v. Franzen, 678 F.2d 58, 59 (7th Cir. 1982). Two circuits (the Third and Eighth) hold that the accused must first demonstrate that, but for counsel's ineffectiveness, the proceedings before the trier of fact would have been materially different in a way "helpful" or "beneficial" to the accused; once the accused makes this showing, the burden shifts to the State to show that counsel's ineffectiveness was harmless beyond a reasonable doubt. United States v. Baynes, 687 F.2d 659, 673 (3d Cir. 1982), and United States ex rel. Green v. Rundle, 434 F.2d 1112, 1115 (3d Cir. 1970); Reynolds v. Mabry, 574 F.2d 978, 980 (8th Cir. 1978) (citing McQueen v. Swensen, 498 F.2d at 220). Three circuits (the Fifth, Ninth and Eleventh) have adopted a standard that requires the accused to demonstrate that counsel's errors and omissions impaired the defense in some fashion. Washington v. Strickland (5th); United States v. Tucker, 716 F.2d at 588 (9th); Adams v. Strickland, 709 F.2d 1443, 1446 (11th Cir. 1983). The Sixth Circuit does not require a showing of prejudice, so there has been no need to formulate a standard. The First and Tenth Circuits have not expressed any opinion on the degree of prejudice that must be shown by a petitioner. See, e.g., United States v. Campa, 679 F.2d

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circuits are concerned, therefore, the outcome oriented standard of prejudice advocated by petitioners and amici curiae is an anomaly articulated in only two circuits -- the Second Circuit, which adheres to the universally condemned "farce and mockery" standard, and the District of Columbia Circuit, which wholly misinterpreted the source of its test.⁴⁹

48/ continued

1006, 1009 (1st Cir. 1982); United States v. Glick, 710 F.2d 639, 644 n.6 (10th Cir. 1983).

49/ In developing its standard, the plurality opinion in Decoster relied extensively on a passage from Commonwealth v. Safarien, 386 Mass. 89, 96, 315 N.E. 2d 878, 883 (1974), which requires a showing that counsel's deficiency "has likely deprived the defendant of an otherwise available, substantial ground of defense." (emphasis added). It is evident that this is a process-oriented test. The Supreme Judicial Court of Massachusetts explicitly relied on process-oriented federal cases; it formulated a test of prejudice that required the defendant to demonstrate impairment to the defense; and the court specifically disavowed any inquiry that would exclusively concentrate on whether the trial was fair or

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Finally, the Court's decisions in the Sixth Amendment area are plainly at odds with an outcome-determinative standard. No decision of the Court involving the Sixth Amendment right to counsel has ever intimated that outcome, as opposed to the effect on the defense, is the appropriate focus of inquiry. See, e.g., Cuyler v. Sullivan, 446 U.S. at 348-49; Holloway v. Arkansas, 435 U.S. at 489-91; Avery v. Alabama, 308 U.S. at 458 (claim of inadequate investigation rejected in part because there was an "absence of any indication, on the motion and hearing for new trial, that [the attorneys] would have done more had additional time been granted."); White v. Ragen, 324 U. S.

49/ continued

guilt was established. Id. at 884. The outcome-oriented test in Decoster therefore bears little relationship to its process-oriented seed.

760, 764 (1975).⁵⁰ And a recent decision of the Court that canvasses the issue of prejudice in the Sixth Amendment context framed the inquiry solely in terms of whether the infringement "has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense." United States v. Morrison, 449 U.S. at 365. (emphasis added). The inquiry was conspicuously not whether the result of a criminal prosecution would have been different if the right to counsel had been properly afforded. See also Weatherford v. Bursey, 429 U.S. 545, 558 (1977).

It is not surprising therefore that

50/ The assertion that Chambers v. Maroney or McMann v. Richardson tacitly adopted this standard [Pet. Br. 83, 93; S.G. 14 n. 4] is simply unsupported by any fair reading of those decisions. See n. 44, *supra*. In fact, invitations to include considerations of outcome in Sixth Amendment analysis have been explicitly rejected by the Court. United States v. Tucker, 404 U.S. 443, 447 n. 5 (1972); Townsend v. Burke, 333 U.S. at 741.

respondent and amici curiae seek precedential support for an outcome-determinative test in non-Sixth Amendment decisions -- most notably in cases interpreting the Due Process Clauses of the Fifth and Fourteenth Amendments, e.g., United States v. Agurs, 427 U.S. 97 (1976), and those discussing the consequences of procedural defaults in trial courts.⁵¹

^{51/} Petitioners and amici curiae also rely on the recent decision in United States v. Valenzuela-Bernal, ___ U.S. ___, 102 S.Ct. 3440 (1982), for a result-oriented standard. This decision is inapposite for several reasons. First, the materiality standard established in Valenzuela-Bernal does not even extend beyond the unique circumstances in that case, which involved the tension between the executive's authority over immigration and the Compulsory Process Clause; the Court expressly reserved opinion on "the showing which a criminal defendant must make in order to obtain compulsory process for securing the attendance of his criminal trial witnesses within the United States." 102 S.Ct. at 3450 n. 9. Second, the Court "borrowed much of [its] reasoning [on prejudice] . . . from cases involving the Due Process Clause of the Fifth Amendment," id. at 3449. To this extent, reliance on Valenzuela-Bernal for an outcome-determina-

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However, as respondent has already explained, the Sixth Amendment orientation focus is very different from the due process concern with outcome.⁵² The Sixth Amendment precludes the states from conducting trials at which "persons who face incarceration must defend themselves without adequate legal assistance." Cuyler v. Sullivan, supra, 446 U.S. at 744. Invocation of due process principles represents an unacceptable effort by petitioner and amici curiae to circumvent this guarantee and resurrect the "farce and mockery"

51/ continued

tive test is no more justifiable than seeking support from the due process line of authority discussed in the text.

52/ The petitioners' and Solicitor General's heavy reliance on United States v. Agurs, as a source of the principles to apply in Sixth Amendment cases is curious, since the Court in Agurs predicated its analysis on the presence of adequate counsel. 427 U.S. at 102 n.5.

progeny of Betts v. Brady.⁵³

Finally, by extrapolating a standard of prejudice from Wainwright v. Sykes, Frady and Engle, the petitioners and amici curiae seek to fit a square peg in a round hole.⁵⁴

53/ Erickson, 17 Am. Crim. L. Rev. 250 n. 143. The suggestion by the petitioners [Pet. Br. 74 n. 18] and the Solicitor General [S.G. 27-8] that Sixth Amendment analysis should be influenced by concern for the attorney's thought processes is equally unsettling and turns the guarantee of effective counsel on its head. The Sixth Amendment embodies a protection for the accused, not a communications privilege for the attorney or a shield to insulate from inquiry counsel's decisions on behalf of the accused when they are challenged by the defendant. Nothing would be more disruptive of Sixth Amendment values than to elevate counsel from an advisor to the accused to an independent functionary whose decisions, however incompetent, are unassailable. Indeed, the "ardor of defense counsel" that petitioners and the Solicitor General seek will be enhanced, not vitiated, by articulated decisions on what constitutes adequate performance. In any event, the Court has already recognized that some degree of judicial supervision over the performance of attorneys is essential, so that "defendants cannot be left to the mercies of incompetent counsel," McMann v. Richardson, 397 U.S. at 771.

54/ For this reason, we also cannot sup-
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As noted earlier, these cases all assume the presence of competent counsel for the defendant. Once the defendant has had "a fair trial and a competent attorney," Engle v. Isaac, 456 U.S. at 134, (emphasis added) the interests in finality and comity dictate stringent rules to prevent "sandbagging" by competent defense lawyers who decide to forego objections in the state forum with the intention of raising their constitutional claims later in a federal habeas court if their client is convicted. Wainwright v. Sykes, 433 U.S. at 89.

By imposing cause and prejudice requirements on persons who failed to make a contemporaneous objection in state court, the Court has made "the state trial on the merits 'the main event' so to speak, rather than a 'tryout on the road' for what will

54/ continued

port the reasoning of the en banc court, which derived its standard of prejudice in part from United States v. Prady.

later be the determinative federal habeas hearing." 433 U.S. at 90. However, while the Constitution does not require that the main event be a "game in which the participants are expected to enter the ring with a near match of skills, neither is it a sacrifice of unarmed prisoners to gladiators." United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir.), cert. denied, 423 U.S. 876 (1974).

While it is justifiable to erect a rigorous standard of prejudice when there has been a procedural default by competent counsel, United States v. Frady, 456 U.S. at 169-70, principles of finality developed in habeas jurisprudence should not shield criminal proceedings flawed by inadequate counsel from scrutiny under the Sixth Amendment.⁵⁵ Consequently, the outcome-

^{55/} The court of appeal's concern that a different standard of prejudice would enable

determinative principles advanced by the petitioners and amici curiae and the Frady standard are foreign to, and inconsistent with, the Sixth Amendment guarantee of adequate counsel.⁵⁶

55/ continued

defendants to circumvent the procedural default cases is unwarranted. [Pet. App. 68 n. 30]. A habeas petitioner claiming inadequate assistance could not obtain review of an unobjected to error; the error would only serve as circumstantial evidence of an inadequate performance by counsel. If the petitioner were able to demonstrate serious derelictions and prejudice under the Sixth Amendment, the relief would be based on counsel's ineffectiveness, not on the merits of the defaulted claim. Therefore, the principles of Wainwright v. Sykes and its progeny, which preclude review of the merits of procedurally defaulted claims, could be fully preserved under a Sixth Amendment standard that is developed independently of the principles set forth in Frady.

56/ The Solicitor General suggests that the Sixth Amendment guarantee should be treated no differently than a new trial motion. [S.G. 18-26]. Historically, however, a new trial motion was "designed to afford relief where despite the fair conduct of the trial, it later clearly appears to the trial judge that because of facts unknown at the time of

In sum, an outcome-determinative test of prejudice is fundamentally at odds with the Court's decisions and the standards developed in the overwhelming majority of the circuits. It is difficult to justify either logically or constitutionally; its exclusive focus on the result of, and not the adequacy of, counsel's performance, threatens to deprive the defendant of everything that makes counsel worthwhile in our adversary system. Additionally, the direction it signals is plainly wrong under the Sixth Amendment -- by permitting the nature

56/ continued

trial, substantial justice was not done." United States v. Johnson, 327 U.S. 106, 112 (1946). See also 8A Moore's Federal Practice ¶33.03[1] (2d ed. 1983). Obviously, after a fair trial with competent counsel, every piece of newly discovered evidence should not necessarily call into question the integrity of the verdict. The focus is therefore quite properly on whether the result would have been different. This underlying policy has little relevance to a trial flawed by the errors or omissions of inadequate counsel. The Solicitor General's false analogy mocks the importance of the Sixth Amendment.

of the offense or the strength of the prosecution to overshadow counsel's obligations, the outcome determinative standard threatens to steer the federal courts towards the untenable position that there may be no need for adequate counsel for certain types of cases or individuals. Any standard that has such fundamental flaws should be soundly rejected by the Court.

2. The Proper Test of Prejudice Requires A Habeas Petitioner To Demonstrate That Counsel's Serious Derelictions Impaired The Defense.

The above discussion reveals the evident superiority of a standard of prejudice that focuses on the impairment to the defense caused by counsel's inadequacies. Simply put, as the overwhelming majority of circuits recognize, when defense counsel is ineffective, the representation of the defendant is "not a product of an adversary, but a flaw in the adversary process." McQueen v. Swenson, 498 F.2d at 218-19. This taint

can only be neutralized by inquiring into "whether counsel's incompetence impaired [the] defense, not whether the defendant would have been convicted in spite of these errors." United States v. Tucker, 716 F.2d at 587. See also McQueen v. Swenson, 498 F.2d at 220; United States ex rel Green v. Rundle, 434 F.2d at 1115. Cf. United States v. Morrison, 449 U.S. at 365.

The standard is also sufficient to guard against baseless attacks on counsel. It first requires a showing that counsel's failings breached the basic responsibilities of reasonably competent counsel. Insignificant or insubstantial errors by diligent counsel would hardly serve to overturn a conviction or sentence. McMann v. Richardson, 397 U.S. at 711. Then there must be a showing that counsel's errors actually impaired the presentation of the defense. For example, if a motion to suppress were not filed, but the evidence could not have been

excluded, there would have been no impairment of the defense. Chambers v. Maroney, 399 U.S. at 53-54. Similarly, if there has been a failure to investigate, but there is nothing that could have been uncovered or the omitted evidence would be cumulative, then the presentation of the defense has not been impaired. Avery v. Alabama, 308 U.S. at 452.

Even if a habeas petitioner could show impairment to the defense, the State could still establish that the denial of the right to effective assistance of counsel was harmless in light of the entire record. See, e.g., United States v. Tucker, 716 F.2d at 588; Washington v. Strickland [Pet. App. 75-76].

As at other points in the consideration of ineffective assistance claims, courts will necessarily have to retain flexibility in the application of this standard to specific cases. While considerations of prejudice do not lend themselves to categorical

rules, there are several factors that should be considered in weighing the extent to which the defense was impaired in a particular case.

First, certain defects in counsel's representation are more basic than others because they deprive the defendant of the undivided allegiance of a partisan and zealous advocate. When there is a conflict of interest, Cuyler v. Sullivan, supra; a lack of vigorous advocacy, Anders v. California, supra; physically or mentally debilitated counsel; or the abdication of counsel's basic responsibilities, the defendant has been effectively deprived of "the prized traditions of the American lawyer." VonMoltke v. Gillies, 332 U.S. at 725-26. Since there has been a fundamental failing of counsel in these instances, the degree of prejudice required will be quite different than that necessary when there has been a momentary lapse in counsel's repre-

sentation during trial.

Second, the pervasiveness of counsel's inadequacies must also be considered. The prejudice to the defense of an isolated error at trial may be more easily discernible than the impact of errors that pervade the entire trial. United States v. Porterfield, 624 F.2d. 122, 124-25 (10th Cir. 1980); United States ex rel. Green v. Rundle, 424 F.2d at 1115. United States v. Morrison, 449 U.S. at 365 n.2.

Third, the effect of counsel's failings that result in an impoverished record must be approached quite differently than other errors whose impact on the defense is more easily ascertainable. Without adequate investigation or preparation, it follows "that the record is necessarily incomplete as to the extent of the prejudice which resulted from counsel's derelictions." United States v. Tucker, 716 F.2d at 593. Cf. Michel v. Louisiana, 350 U.S. 91, 100-01 (1955);

White v. Ragen, 324 U.S. at 762, 764; Avery v. Alabama, 308 U.S. at 447.

Fourth, just "as the severity of the sentence [in a capital case] mandates careful scrutiny in the review of any colorable claim of error," Zant v. Stephens, 103 S.Ct. at 2747, so too do "capital cases demand special efforts by counsel and special sensitivity by courts to the impact of counsel's actions." [S.G. 11 n.3].

A fifth factor to consider is the nature and subtlety of the issues. Where the issue is guilt or innocence, a determination closely bounded by legal rules, the probable effect upon the defense of counsel's failure to locate witnesses or evidence may be undertaken with some degree of confidence. In contrast, in the highly discretionary area of sentencing, the extent to which counsel's inadequate preparation or investigation impaired the defense is much more difficult

to assess. Even under constitutionally valid schemes, "[o]nce the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty . . . the jury is then free to consider a myriad of factors to determine whether or not death is the appropriate punishment." California v. Ramos, ___ U.S. ___, 103 S. Ct. 3446, 3456 (1983); Zant v. Stephens, 103 S. Ct. at 2756 (Rehnquist, J., concurring). In this context, a showing that counsel failed to uncover readily available and non-cumulative information relevant to the sentencing determination should be sufficient to establish prejudice. See, e.g., Pickens v. Lockhart, 714 F.2d at 1467-68; Voyles v. Watkins, 489 F. Supp. 901, 912 (N.D. Miss. 1980).⁵⁷ The simple truth is that the

^{57/} It is in this context that the panel's formulation of "helpful", 673 F.2d at 902,

precise effect of mitigating information on the sentencer in a capital case is inherently indeterminable:

The precise point which prompts the penalty in the mind of any one juror is not known to us and may not even be known to him. Yet this dark ignorance must be compounded twelve times and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner.

We cannot determine if other evidence before the jury would neutralize the impact of an error and uphold a verdict. Such factors as the grotesque nature of the crime, the certainty of guilt, or the arrogant behavior of the defendant may conceivably have assured the death penalty despite any error. Yet who can say that these very factors might not have demonstrated to a particular juror that a defendant, although legally sane, acted under the demands of some inner compulsion and should not die? We are unable to ascertain whether an error which is not purely insubstantial would cause a different

57/ continued

makes sense. When the decision is the highly discretionary one between life and death, the omission of any evidence regarding the defendant's background or character that would be helpful to the sentencer would represent a substantial impairment to the defense. That is the precise issue the panel was addressing.

result; we lack the criteria for objective judgment.

People v. Hines, 390 P.2d 398, 402 (Cal. 1964) (emphasis in original). Accord People v. Terry, 390 P.2d 381, 392 (Cal. 1964); Pickens v. Lockhart, 714 F.2d at 1467-68.

The interplay of these factors may take on different meanings in the myriad circumstances confronted by courts. While none of the factors will be dispositive on the issue of prejudice, they should guide the courts in assessing whether the circumstances in a particular case are sufficient to merit relief under the Sixth Amendment.

C. Application of Appropriate Sixth Amendment Principles To The Record In This Case Convincingly Establishes That Respondent Was Deprived of the Effective Assistance of Counsel At His Capital Sentencing Hearing

The application of the basic Sixth Amendment principles articulated above to the present case point unerringly to the conclusion that counsel was ineffective in

failing to conduct any independent investigation for mitigating information about the respondent. Furthermore, this serious error severely impaired the respondent's presentation of his case at a capital sentencing hearing.

First, the stakes were life or death.

Second, the district court explicitly found that Tunkey ceased any preparation or investigation of respondent's case out of a sense of hopelessness and despair after respondent confessed to three murders.⁵⁸ [Pet. App. 264; J.A. 300, 302-04, 426]. He never attempted to undertake the role of an active and zealous advocate for his client's life. The integrity and fairness of the adversary proceedings were wholly undermined by the essential withdrawal of defense coun-

^{58/} Since Tunkey had not focused on sentencing prior to the confessions (see note 3, supra), the sentencing aspects of petitioner's capital case went totally by default.

sel from the sentencing process.

Third, counsel was unable to provide a "guiding hand" at sentencing because he lacked the indispensable factual prerequisites for the exercise of informed judgment. The district court found as a fact that Tunkey did not seek any witnesses in mitigation [Pet. App. 264-65] nor did he conduct "an independent investigation into petitioner's background and potentially mitigating emotional and mental reasons for the killings." [Pet. App. 282]. Without this factual information, counsel could do little more than rely on respondent's statements at the guilty plea proceedings [J.A. 322-23]; he certainly could not meaningfully advise the respondent on what mitigating information could and should be presented to the sentencer.⁵⁹ Tunkey's "total abdication

59/ Tunkey's recollection that the respon-
(footnote continues on following page)

of duty should never be viewed as permissible trial strategy." Pickens v. Lockhart, 714 F.2d at 1467.⁶⁰

59/ continued

dent did not want anyone at his sentencing hearing [J.A. 408] was not credited by the district court as the reason for Tunkey's failure to investigate. In any event, a criminal defendant is hardly able to make a decision on what options to pursue without counsel's sound advice. Yet, Tunkey was unable to discharge this responsibility because he lacked the essential factual ingredients that an adequate investigation would have provided. Any other requirement in the Sixth Amendment area would allow the use of the accused's ignorance of the law and facts as an excuse for counsel's inadequacies when it is this very ignorance that makes diligent preparation by counsel indispensable to the defendant.

60/ Even assuming an attorney could make a tactical judgment in a capital case without adequate investigation of mitigating evidence, the record shows that Tunkey never made the judgment now attributed to him by the petitioners. [Pet. Br. 98-100]. He did in fact attempt -- albeit wholly ineffectively -- to place information before the sentencing judge about petitioner's character and background, as well as the circumstances surrounding the offenses. He also argued to Judge Fuller in support of a life sentence that David Washington "possesses somewhere within him a spark which is good,

(footnote continues on following page)

Fourth, counsel's inadequate preparation resulted in the impoverishment of the record, depriving the sentencer of the knowledge about the character and background of the defendant that is indispensable to an "individualized determination" of whether life or death is the proper punishment. Zant v. Stephens, 103 S. Ct. at 2743-44; Eddings v. Oklahoma, 455 U.S. 104, 110-112 (1902); Woodson v. North Carolina, 428 U.S. at 304.

Fifth, the subtle influences that are involved in reaching a life or death decision under Florida law make it particularly difficult to assess the impact of counsel's

60/ continued

which is decent." [J.A. 322]. Without evidence in mitigation demonstrating that respondent's crimes were the product of unusual mental and emotional pressures, and were wholly inconsistent with his character or prior history, a plea for mercy on the basis of "a spark which is good, which is decent," lacked any detectable factual foundation and was hardly likely to impress a judge.

errors upon a record thus impoverished. Under Florida's capital sentencing scheme, "even if the statutory threshold has been crossed and the defendant is in the narrow class of persons who are subject to the death penalty, the sentencing authority is not required to impose the death penalty." Barclay v. Florida, 103 S. Ct. at 3431. State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973). Indeed, the Florida courts have developed a series of precedents "in which, even though statutory mitigating circumstances do not outweigh statutory aggravating circumstances, the addition of non-statutory mitigating circumstances tips the scales in favor of life imprisonment." Barclay, 103 S.Ct. at 3431-3432. Numerous Florida cases emphasize the critical, often determinative, significance of non-statutory mitigating circumstances in the life or

death decision.⁶¹ Counsel's inadequacies in the present case deprived respondent of the non-statutory mitigating information that Florida sentencers have repeatedly employed in their capital sentencing calculus.⁶²

61/ See, e.g., McCampbell v. State, 421 So. 2d 172 (Fla. 1982) (life sentence based on exemplary employment record, potential rehabilitation, and family background); Simmons v. State, 419 So. 2d 316, 320 (Fla. 1982) (evidence of potential rehabilitation must be considered); Walsh v. State, 418 So. 2d 1000, 1002 (Fla. 1982) (life sentence based on good character); Moody v. State, 418 So. 989, 995 (Fla. 1982) (error in failing to consider personality change following return from war and distorted religious beliefs of the defendant); Neary v. State, 384 So. 2d 881, 885-87 (Fla. 1980) (life sentence based on various non-statutory mitigating factors, including family background and slow learning capacity of defendant); Shue v. State, 366 So. 2d 387, 389-90 (Fla. 1978) (life sentence based on family background of brutality and deprivation); Halliwell v. State, 323 So. 2d 557, 561 (Fla. 1975) (life sentence based on emotional strain from victim's mistreatment of girlfriend).

62/ The importance accorded non-statutory mitigating circumstances by Florida courts

In sum, respondent has shown that he did not receive representation within the range of competence demanded of attorneys in criminal cases and that counsel's ineffectiveness impaired the presentation of the defense at his capital sentencing hearing.

III.

THE COURT OF APPEALS CORRECTLY
DETERMINED THAT TESTIMONY OF
THE STATE SENTENCING JUDGE ON
THE ISSUE OF PREJUDICE WAS
INADMISSIBLE

At the evidentiary hearing in the district court, the state sentencing judge [Judge Fuller] was allowed to testify, over petitioner's objections, about the weight he had accorded to the aggravating and mitigating circumstances that he found were present in this case [J. A. 457-460] and about

62/ continued

(supra at note 61) belies petitioners' assertion that the prejudice to the respondent is somehow diminished by the fact that counsel's derelictions pertained to non-statutory mitigating information. [Pet. Br. 98-99; S.G., 9-12].

whether the evidence that could have been presented by constitutionally adequate counsel would have altered his sentencing determination. [J.A. 461-463; 478-479].

Although the district court did "not treat[] Judge Fuller's testimony" as determinative on the issue of prejudice" [Pet. App. 285], it did "consider[] Judge Fuller's testimony" [Pet. App. 285] in finding that no prejudice resulted from inadequate counsel under the outcome-determinative standard.

The court of appeals was correct in concluding that the district judge erred in considering this testimony.

First, the state judge's testimony is irrelevant to the proper standard for assessing prejudice from counsel's ineffectiveness. As discussed above, the appropriate focus of inquiry should be on the impairment to the defense, not the outcome of the sentencing proceeding.

Second, the testimony of the sentenc-

ing judge violates the well-settled principle that a judge should not be questioned about his mental processes in reaching a decision. In Fayerweather v. Ritch, 195 U.S. 276 (1904), the Court held:

[T]he testimony of the trial judge, given six years after the case had been disposed of, in respect to matters he considered and passed upon, was obviously incompetent. . . .
[N]o testimony should be received except of open and tangible facts - matters which are susceptible of evidence on both sides.

Id. at 306-07.

Since then, the Fayerweather principle has prohibited, without exception or qualification, any testimony that probes or compromises the mental processes of a decision-maker in formulating a judgment. See, e.g., United States v. Morgan, 313 U.S. 409, 422 (1941); Chicago B. & Q. Ry. Co. v. Babcock, 204 U.S. 585, 593 (1907); United States v. Crouch, 566 F.2d. 1311, 1316 (5th Cir. 1978); National Labor Relations Board v. Air Associates, 121 F.2d 586, 591 (2d Cir. 1941).

Petitioners are unable to point to any case - state or federal - that has upheld the admissibility of a state judge's subjective processes. 28 U.S.C. § 2245, upon which petitioners rely, is clearly inapposite; the express terms of the statute relate to a certificate "setting forth the facts occurring at the trial,"⁶³ not the judge's mental processes. Id. (emphasis added). Furthermore, the Court's decisions in Gardner v. Florida and United States v. Tucker do not support the admissibility of such testimony. [Pet. Br. 102, 103, 105]. In neither Gardner nor Tucker did the Court send the case back to the sentencer to

63/ 28 U.S.C. § 2245 provides in pertinent part:

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence.

determine whether it would have reached the same result without the taint.⁶⁴ Instead, in both cases the Court required the sentencer to conduct a new sentencing hearing.⁶⁵

Petitioners' contention that the judge's testimony was admissible as opinion evidence

64/ In Gardner, the flaw was a failure to disclose information in a pre-sentence report to defense counsel; in Tucker, the error was the consideration at sentencing of prior invalid convictions.

65/ There is also no decision in the circuits that justifies the admissibility of this testimony. Cases where testimony or a certificate of a state sentencing judge has been considered generally involve the judge's opinions on counsel's competency or matters of basic, historical fact. See, e.g., Haggard v. Alabama, 550 F.2d 1019, 1022 (5th Cir. 1977); Williams v. Beto, 354 F.2d 698, 703 (5th Cir. 1965). Such testimony does not implicate the Fayerweather principle. [Pet. App. 76-77].

Other cases cited by the petitioners [Pet. Br. 102] never considered the admissibility under Fayerweather of testimony relating to a sentencing judge's mental processes. See Hampton v. Wyrick, 588 F.2d 632, 633-34 (8th Cir. 1979) Strader v. Troy, 571 F.2d 1263 (4th Cir. 1978).

under Federal Rule of Evidence 704⁶⁶ [Pet. Br. 101-02] is simply not supportable. Nothing in Rule 704 or its commentary justifies the novel assertion that this provision tacitly overrules the longstanding Fayerweather doctrine.

It is easy to understand the unqualified adherence to Fayerweather, since there are sound reasons underlying the rule. Its primary rationale, of course, is that a judge's written orders or orally pronounced judgments should stand complete in themselves and not be undermined by after the fact testimony. Additionally, as the court of appeals recognized, "a rule that allows the probing of the mental processes of a state judge would exacerbate certain pro-

66/ This rule states:

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

blems that are already inherent in the habeas corpus context." [Pet. App. 79]. While in this case the testimony was used to sustain a judgment, fundamental notions of fairness would require that litigants seeking to impeach a judgment be afforded a similar opportunity. This would inevitably subject state court judges to probing and wide ranging inquiries into their subjective processes of decision-making in all sorts of situations.

Furthermore, petitioners' argument has no discernible limits. There is plainly no basis for distinguishing between the judge in the present case and the members of the sentencing jury in those states where the jury is involved in the sentencing process (like Florida) or makes the definitive sentencing decision.⁶⁷ The disastrous

67/ Fayerweather itself was based on Packet Co. v. Sickles, 72 U.S. (5 Wall.)

(footnote continues on following page)

consequences of opening up state court jury deliberations to inquiry in federal courts are self-evident.

Finally, contrary to petitioners' suggestion [Pet. Br. 105], it is extremely doubtful that the Fayerweather rule would be relaxed if the habeas petitioner in a death case sought the admission of favorable testimony regarding a sentencing judge's mental processes. [Pet. Br. 104]. Fayerweather and its progeny set forth an unqualified rule excluding such testimony. See United States v. Crouch, 566 F.2d at 1316. Circumstances could conceivably arise in which a modification of the rule in favor of a death-sentenced petitioner would be required by either the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment, cf. Green v. Georgia, 442 U.S.

66/ continued

580, 593 (1866) which prohibited inquiries into the mental processes of jurors.

95, 97 (1979), but that is true of any evidentiary rule in extraordinary cases. See, e.g., Chambers v. Mississippi, 410 U.S. 284 (1973). It is no reason for abandoning the rules of evidence.

In sum, the record reflects that the district judge explicitly considered evidence which is both (1) irrelevant to the proper standard for assessing prejudice under the Sixth Amendment, and (2) patently inadmissible under settled rules of evidence based on sound policy considerations. Since there is no means of determining the extent to which this incompetent evidence affected the district court's analysis of respondent's claims, reversal is required to ensure adjudication of these claims uninfluenced by consideration of the inadmissible testimony.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be

affirmed, and the case should be remanded to the court of appeals for further proceedings consistent with the analysis, as set forth above, of claims of ineffective assistance of counsel under the Sixth Amendment.

Respectfully submitted,

JOSEPH H. RODRIGUEZ
PUBLIC DEFENDER

By: RICHARD E. SHAPIRO

November 29, 1983

Appendices

APPENDIX A

Q. [Counsel for Washington] So that the record is complete, prior to the sentencing hearing, you never obtained or requested a psychiatric or psychological examination of David Washington; is that correct?

A. [Tunkey] No, I never requested one, that is correct. That is 100 percent correct.

Q. And also, prior to the December 6th sentencing hearing --

A. I never asked for one.

Q. -- you had not conducted any interviews or investigations of people who might have been familiar with David Washington's background, childhood or activity in the community?

A. I believe that to be essentially correct, with the exception of my conversations with David himself and what

brief conversations I had with his wife on the phone.

Q. From your knowledge of David Washington's background gleaned from discussions with him and your knowledge about the crimes of which he was charged or at that point of which he had been convicted, did you see, in your judgment, that there was a great disparity from what you had understood David Washington's past to be and the crimes of which he was convicted?

A. It was like night and day.

Q. So, you saw the tremendous difference between the person.

Did you also see the difference between the person you were interviewing and working with as a client and the person who had been charged and convicted of these crimes?

A. So far as I could tell, the

answer to that question, from my numerous interviews with David, the answer to that question was that there was just an absolutely inexplicable difference between the personality which I knew as compared to the crimes charged and the admissions which he had made.

Insofar as admitting that he had done these various things was an inexplicable kind of circumstance.

Q. Did you at any point in time consider that psychiatric or psychological examination would have been useful for you in understanding Mr. Washington's behavior and preparing for his sentencing hearing?

A. No.

Q. You did not? Did you request a pre-sentence investigation prior to the sentencing hearing?

A. Not that I recall [Transcript continues after ellipsis on J.A. 404].

APPENDIX B

First Circuit: United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir. 1978) ("[T]he quality of a defense counsel's representation should be within the range of competence expected of attorneys in criminal cases."); United States v. Fusaro, 708 F.2d 17, 26 (1st Cir. 1983) (same).

Third Circuit: Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) ("[T]he standard of adequacy of legal services . . . is the exercise of the customary skill and knowledge which normally prevails at the time and place."); United States ex. rel. Caruso v. Zelinsky, 689 F.2d 435, 438 (3d Cir. 1982) (same).

Fourth Circuit: Marzullo v. State of Maryland, 561 F.2d 540, 543 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978) (Defense counsel's representation must be

"within the range of competency demanded of attorneys in criminal cases"); Arthur v. Bordenkircher, 715 F.2d 118, 119 (4th Cir. 1983) (same).

Fifth Circuit: MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), rev'd on other grounds, 289 F.2d 928 (en banc), cert. denied, 368 U.S. 877 (1961). (Sixth Amendment guarantee entitles defendant to "counsel reasonably likely to render and rendering reasonably effective assistance"); United States v. Rusmisl, 716 F.2d 301, 304 (5th Cir. 1983) (same).

Sixth Circuit: Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974). (The Sixth Amendment guarantees "counsel reasonably likely to render and rendering reasonably effective assistance" and "defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law.")

These standards are used interchangeably. See, e.g., Adams v. Jago, 703 F.2d 978, 980 (6th Cir. 1983); United States v. Martin, 704 F.2d 267, 274 (6th Cir. 1983).

Seventh Circuit: United States ex. rel. Williams v. Twomey, 510 F.2d 634, 641 (7th Cir. 1975), cert. denied, 423 U.S. 876 (1975) ("[T]he Constitution guarantees a criminal defendant legal assistance which meets a minimum standard of professional representation."); United States v. Zylstra, 713 F.2d 1332, 1338 (7th Cir. 1983) (same).

Eighth Circuit: Morrow v. Parratt, 574 F.2d 411, 412 (8th Cir. 1978) ("[T]he defendant must show that his attorney failed to exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances."); Lufkins v. Solem, 716 F.2d 532, 539-540 (8th Cir. 1983) (same).

Ninth Circuit: Cooper v. Fitzharris, 586 F.2d 1325, 1329 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979) ("[E]ffective assistance means assistance within the range of competence demanded of attorneys in criminal cases.")

Tenth Circuit: Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir. 1979) (en banc), cert. denied, 445 U.S. 945 (1980) ("The Sixth Amendment demands that defense counsel exercise the skill, judgment and diligence of a reasonably competent defense attorney"); United States v. Glick, 710 F.2d 639, 644 (10th Cir. 1983) (same).

Eleventh Circuit: King v. Strickland, 714 F.2d 1481, 1485 (11th Cir. 1983) ("The sixth amendment guarantees a criminal defendant the right to counsel reasonably likely to render, and rendering, reasonably effective assistance");

Wiley v. Wainwright, 709 F.2d 1412,
1413 (11th Cir. 1983) (same).

District of Columbia Circuit:

United States v. DeCoster, 624 F.2d 196,
208 (D.C. Cir.) (en banc), cert. denied,
444 U.S. 944 (1979) ("The claimed inade-
quacy must be a serious incompetency
that falls measurably below the perform-
ance ordinarily expected of fallible
lawyers."); United States v. Green, 680
F.2d 183, 188 (D.C. Cir. 1982), cert.
denied, ___ U.S. ___, 103 S.Ct. 1204
(1983) (same).

The Second Circuit is the only
circuit which still retains the "farce
and mockery" standard. United States
v. Wight, 176 F.2d 376, 379 (2d Cir.
1949), cert. denied, 338 U.S. 950 (1950)
("A lack of effective assistance of
counsel must be of such a kind as to
shock the conscience of the Court and

make the proceedings a farce and
mockery of justice."); United States
v. Maniego, 710 F.2d 24, 27 (2d Cir.
1983) (same).

APPENDIX C

Ten Circuits require a habeas petitioner to bear the burden of proof on the issue of prejudice.

First Circuit: United States v. Campa, 679 F.2d 1006, 1014 (1st Cir. 1982) (Petitioner bears burden of establishing actual prejudice).

Second Circuit: LiPuma v. Commissioner, Dept. of Corrections, State of New York, 560 F.2d 84, 92 (2d Cir. 1977), cert. denied, 434 U.S. 861 (1977) (Petitioner must prove actual and not possible prejudice).

Third Circuit: United States ex rel. Green v. Rundle, 434 F.2d 1112, 1115 (3d Cir. 1970) (Petitioner must demonstrate prejudice where discrete errors of counsel are alleged, but not where there are claims of pervasive incompetence).

Fifth Circuit: Washington v. Watkins, 655 F.2d 1346, 1362 (5th Cir. 1981), cert denied, 456 U.S. 949 (1982).

Seventh Circuit: United States v. Berkowitz, 619 F.2d 649, 659 (7th Cir. 1980); but see, United States ex rel. Healey v. Cannon, 553 F.2d 1052, 1057 n. 7 (7th Cir.), cert. denied, 434 U.S. 874 (1977) (suggesting no showing of prejudice is required).

Eighth Circuit: Lufkins v. Solem, 716 F.2d 532, 540 (8th Cir. 1983); Morrow v. Parratt, 574 F.2d 411, 412-13 (8th Cir. 1978).

Ninth Circuit: United States v. Tucker, 716 F.2d 576, 588 (9th Cir. 1983); Cooper v. Fitzharris, 586 F.2d 1325, 1331 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979).

Tenth Circuit: United States v. Glick, 710 F.2d 639, 644 (10th Cir.

1983); United States v. Golub, 694 F.2d 207, 215-16 (10th Cir. 1982). In certain instances, however, the Tenth Circuit does not require a showing of prejudice. United States v. Cronic, 675 F.2d 1126, 1128 (10th Cir. 1982), cert. granted, ___ U.S. ___ (1983), and where incompetence of counsel is pervasive, the government bears the burden of establishing the lack of prejudice. United States v. Payne, 641 F.2d 866, 867-68 (10th Cir. 1981); United States v. Porterfield, 624 F.2d 122, 124-25 (10th Cir. 1980).

Eleventh Circuit: King v. Strickland, 714 F.2d 1481, 1488 (11th Cir. 1983).

District of Columbia Circuit: United States v. Decoster, 624 F.2d 196, 208 (D.C. Cir. 1979) (en banc), cert. denied, 444 U.S. 944 (1979).

The Fourth Circuit only requires the petitioner to demonstrate that his counsel failed to meet certain minimum requirements. Once any of these requirements has not been satisfied, the petitioner is entitled to relief unless the State can show that the lawyer's derelictions were harmless. Wood v. Zahradnick, 578 F. 2d 980, 982 (4th Cir. 1978); Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968), cert. denied, 393 U.S. 849 (1968).

The Sixth Circuit does not require any showing of prejudice once petitioner has established that counsel failed to render reasonably effective assistance. Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974).

CASE NO. 82-1554

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

CHARLES E. STRICKLAND,
Superintendent
Florida State Prison;
JIM SMITH, Attorney General
of Florida, and LOUIE L. WAINWRIGHT
Secretary, Florida Department
of Corrections,

Petitioners,

vs.

DAVID LEROY WASHINGTON,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for
the Eleventh Circuit

REPLY BRIEF OF PETITIONERS

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ARGUMENT

A. Defendant's Factual Analysis
Is Erroneous

The Defendant asserts that the United States District Court found as, "a basic, historical fact" that the Defendant's counsel William Tunkey, "ceased any serious preparation or investigation of [the Defendant's] case approximately one month after being appointed, because he was immobilized by a 'hopeless feeling' upon learning that Mr. Washington had confessed to capital murders. . ." Defendant's brief p. 2.

Contrary to the Defendant's analysis, the United States District Court found only, that up until the point of the Defendant's confessions, Bill Tunkey had "actively pursued pretrial motions and discovery" and that even after the confessions, Bill Tunkey advised the Defendant against the entry of guilty

pleas and the Defendant's waiver of a sentencing jury. A264-A265. The Defendant's assertion that the State did not challenge any findings of the United States District Court is also erroneous. Id. at n. 2. The State did file a cross-appeal (JA510) and vigorously contended in both its initial brief and its supplemental brief to the en banc court that there was no basis to find that the Defendant was denied effective assistance of counsel. As reflected in the record, Tunkey did not "cease his preparation" but rather vigorously argued that four statutory aggravating circumstances did not apply; that certain statutory mitigating circumstances did apply and that the Defendant committed the murders while under extreme mental or emotional disturbance. See, JA332-JA336. Furthermore, contrary to the Defendant's bare assertion, Tunkey indicated that in

his pretrial preparation, statutory aggravating and mitigating circumstances were part of the consideration. See JA374-JA377. Thus, the Defendant's attempt to portray his counsel as utterly unprepared is without record support.

To the contrary, the present record clearly reflects that Tunkey made a conscious tactical choice as to his method of presentation and rejected each and every one of the suggested omissions which the Defendant only now proposes. Even the original panel majority below conceded that Tunkey was an active advocate, proceeding with a deliberate course of defense. Washington v. Strickland, 673 F.2d 879, at 900-901 (5th Cir. 1982). The Defendant attacks his counsel now, citing Mr. Tunkey's remarks that he could find every little to address in terms of statutory mitigation. Defendant's brief at p. 8. However, the

Defendant himself even after extensive litigation has yet to produce even a shred of statutory mitigation. As plainly reflected on the record, Tunkey made a clear tactical choice to proceed in the manner in which he proceeded and would not have used the affidavits the Defendant now offers even if they had been available at the time. See, 673 F.2d at 908. The record herein therefore does not establish as the Defendant contends, "a substantial amount of readily available evidence on the critical issue of whether [the Defendant's] would live or die." There has been nothing offered to show that there would have been in any material difference whatsoever in the sentencing proceeding below or the trial court's finding of six statutory aggravating circumstances and no statutory mitigating circumstances. Although the

Defendant claims that the sentencing proceeding below was "fundamentally skewed" he offers no relevant or cogent reason for such a summary allegation. The Defendant's barren claim that Tunkey, failed to do anything at all, "out of despair" is simply not supported by the record. To the contrary, Tunkey, an experienced criminal defense lawyer, testified that based upon his knowledge of the trial judge and the circumstances of the case, he made a deliberate tactical choice to proceed as he did. JA401-JA408; JA429-JA430. The Defendant did not produce any witnesses or evidence below that Tunkey's reasoned strategy with regard to the trial judge, Fuller, was erroneous. Given the circumstances and the trial judge, the Defendant has not shown that another attorney similarly situated would have handled the case differently.

B. The Present Claim of Ineffective Assistance of Counsel Is Properly Examined Under the Due Process Clause Of the Fourteenth Amendment

The Defendant premises his entire presentation to this court upon a theory that the federal courts and this court should get into the business of analyzing every attorney's performance under the Sixth Amendment through detailed supervision of what an attorney did or did not do in each and every case. The Defendant therefore claims that if counsel's acts or omissions, "impaired his defense," that is a sufficient showing for a finding of ineffective assistance of counsel. First of all, the states establish the standards for the admission to the practice of law and regulate and supervise the continuing practice of law. It is also therefore the states that supervise and determine whether or not an attorney is competent.

If a state has formulated a standard for evaluating the competency of counsel, e.g., Knight v. State, 394 So.2d 997 (Fla. 1981) and that standard for competent counsel does not fall below any fundamental constitutional minimum under the Fourteenth Amendment, any federal court inquiry should go no further than to determine that it was fairly applied. Cf, Wainwright v. Goode, ____ U.S. ____, 34 Crim.L.Rep. 4101 (1983). This court should not therefore under the guise of the Sixth Amendment engage in detailed supervision of the competency of counsel.

Secondly, the Defendant's ad hoc "I-know-it-when-I-see-it" approach to a standard for ineffective assistance of counsel claims leaves the finality of judgments to the whim of a purely subjective standard and the trial-lawyer experience or lack thereof of any particular court. Compare, King v. Strickland, 714

F.2d 1481 (11th Cir. 1982); Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983). In Spraggins, defense counsel in the face of overwhelming evidence attempted to save the defendant from the death penalty by maintaining, "his credibility before the jury" and arguing to the jury during his closing argument that they should be merciful to the defendant. Defense counsel did not ignore any defenses nor was he unaware that the death sentencing proceeding would follow the trial. Conceding that an argument of innocence would have been "somewhat hypocritical" in the face of overwhelming evidence, the Spraggins court nevertheless citing Washington v. Strickland, imposed its subjective view of the proper tactical choice and found that counsel was ineffective in his closing argument and that counsel's ineffectiveness caused actual prejudice

to the defendant. Id at 1194-1195.

Similarly, in King, the court labored through a detailed analysis of the defendant's claim that his attorney was ineffective at trial and rejected that claim. However, as to the penalty phase, citing Washington v. Strickland, the court found that counsel was ineffective because of what the court subjectively considered was a "weak" closing argument and because counsel failed to present all available character witnesses. Defense counsel in King did call other witnesses in mitigation, but the King court seemed to subjectively fault counsel for being ineffective because he didn't call every witness that the defendant had suggested irrespective as to the actual effect of such an omission. 714 F.2d at 1490-1491. The King court's analysis of defense counsel's closing argument also centers upon perhaps what a better attorney might

have done under the same circumstances, rather than in terms of fundamental constitutional error under the Fourteenth Amendment. Id. at 1491. It is apparent in King and Spraggins that the Court below under the guise of the Sixth Amendment and the present decision has improperly opened constitutional analysis to an entire array of subjective second-guessing. Cf., Hamlin v. United States, 418 U.S. 87 (1974)(pornography).

The same error in the Defendant's analysis is contained at pages 59-60 of the Defendant's brief. The Defendant argues that the en banc court erred in adopting this court's standard in United States v. Frady, 456 U.S. 152 (1982), because the analysis by this court in Frady is, "foreign to--indeed, in conflict with-- basic Sixth Amendment principles." The Defendant also contends that neither Frady nor Engle are relevant

herein because they involve a presumption of competent counsel and the "cause and prejudice" analysis under Wainwright v. Sykes, 433 U.S. 72 (1977). First of all, this court in Engle and Frady made no presumption that counsel was competent. Secondly, in Engle, the court placed no narrow limit upon the scope of its analysis of ineffective assistance of counsel claims. The Court instead observed that the writ of habeas corpus is, "a bulwark against convictions that violate 'fundamental fairness,'" [Emphasis added]. 102 S.Ct. at 1570. The court also noted that the writ, "entails significant costs." Id. at 1571. Reviewing Wainwright v. Sykes, 433 U.S. 72, at 97 (1977) the Court therefore refused to limit Sykes "cause" and actual prejudice standards to cases in which the constitutional error has not affected the truth finding function of a trial. 102 S.Ct.

at 1572. Compare also, Friendly, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgements," 38 U.Chi.L.Rev. 142 (1970). In both Frady and Engle as directly applicable herein the Court clearly expanded its analysis to set broad constitutional limits upon claims of ineffective assistance of counsel and the present use and abuse of the great writ.

The Defendant's efforts to resurrect the original panel opinion below through a proposed standard that counsel's actions or inactions "impaired his defense"¹ is an attempt to impose upon this case a standard reserved for those cases wherein this court has made a policy decision that error is presumptively harmful in circumstances tantamount to no counsel at all or where

¹This "standard" was not preserved below. The Defendant neither filed a motion for rehearing of the decisions below nor a cross-petition for certiorari in the present case.

counsel was prevented from discharging critical function or in a circumstance wherein counsel has an actual conflict of interest. See, e.g., Cuyler v. Sullivan, 446 U.S. 335 (1980); Herring v. New York, 422 U.S. 853 (1975); Geders v. United States, 425 U.S. 80 (1970); Powell v. Alabama, 297 U.S. 45 (1932). However, even the panel majority below recognized that the present circumstance is clearly distinguished from one in which any error is presumptively harmful as in the Sixth Amendment cases or in those cases wherein the denial of due process and a fair trial is tantamount to no counsel at all. 673 F.2d at 900-901; see Holloway v. Arkansas, 435 U.S. 475 (1978); Davis v. Alaska, 415 U.S. 308 (1974) (confrontation clause); White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 at 54 (1961) (right to counsel).

Under the State's standard, first, any defendant has the burden to properly

plead his claim against his counsel, by reciting appropriate details rather than mere conclusions. Secondly, a defendant has the burden to show that his counsel's act or omission was measurably below that of competent counsel. This should not be shown by reference to ideal lists of what counsel should do². Subsumed in this second requirement is the procedural default analysis under Wainwright v. Sykes. Unless a defendant can transcend the cause and prejudice requirement as articulated in Sykes and Engle, he cannot carry his burden under the second part of the analysis suggested by the State. Thirdly, a defendant has the burden to show in the context of his particular

²It is interesting to note that the Defendant apparently agrees with the State in this regard in his effort to criticize the en banc court and its labyrinth of claims against counsel based upon the "duty" to investigate. Defendant's Brief at pp. 43-44.

case that there is a substantial likelihood that his counsel's act or omission affected the outcome of the case. The State would emphasize here that a defendant need only show a likelihood, not that the claim did affect the outcome of the case. Fourth, the State may in fact show by proof beyond a reasonable doubt that there was no prejudice in fact.

This proposed standard is completely consistent with the decisions of this court including Engle and Frady, which place the burden of proof in collateral proceedings entirely upon a defendant, e.g., Frady, 102 S.Ct. at 1572, 1596; Henderson v. Kibbe, 431 U.S. 145, at 154-155 (1977); United States ex rel. Darcy v. Handy, 351 U.S. 454 at 463 and focus upon a likelihood that the outcome would have been different, see, Smith v. Phillips, __ U.S. __, 102 S.Ct. 940

(1982); United States v. Valenzuela-Bernal, __ U.S. ___, 102 S.Ct. 3440 (1982); United States v. Agurs, 427 U.S. 97 (1976); Chambers v. Maroney, 399 U.S. 42 (1970); Comment, "'Fundamental Miscarriage of Justice': The Supreme Court's Version of the 'Truly Needy' in Section 2254 Habeas Corpus Proceedings" 20 San Diego Law.Rev. 371, at 374 (1983). Even in McMann v. Richardson, 397 U.S. 759 at 772 (1970), the Court said that a defendant must demonstrate and carry the burden to show, "gross error" upon the part of his counsel.

Furthermore as noted, Frady and Engle demonstrate that constitutional analysis of the present claim must be under the limited Fourteenth Amendment guarantee of due process and fundamental fairness. e.g., Ingraham v. Wright, 430 U.S. 651, at 675 (1977); Donnelly v. DeChristoforo, 416 U.S. 637, at 642

(1974). Additionally, since a defendant cannot logically be said to have been treated unfairly by something which did not affect him, the requirement of harm and actual prejudice is inherent in the concept of due process and fundamental fairness. See Beck v. Washington, 369 U.S. 541 (1962); Donnelly v. DeChristoforo, Henderson v. Kibbe, supra; Cupp v. McNaughten, 414 U.S. 141 (1973); see also, United States v. Lovasco, 431 U.S. 783, 789-790 (1977) (pre-indictment delay); United States v. Agurs, 427 U.S. 97 (1976). United States v. Marion, 404 U.S. 307, at 325-326 (1971). Unlike the State's analysis the Defendant's "impairment-of-defense" standard does not involve any fundamental fairness/due process analysis or require proof of actual prejudice and should therefore be summarily rejected.

C. Judge Fuller's Testimony
Erroneously Excluded

At page 102 of his brief, the Defendant claims, "petitioners are unable to point to any case-state or federal-that has upheld the admissibility of a state judge's subjective processes." In the present case there is no inquiry into the "subjective processes" of Judge Fuller at the time he entered his sentence. Rather, consistent with Agurs, and its progeny, Judge Fuller was permitted to explain as he would in any proceeding under Agurs the effect if any of any "new evidence" upon the outcome of a previous proceeding. In any event, contrary to the Defendant's statement, for example, in Hampton v. Wyrick, 588 F.2d 632 (8th Cir. 1978), a state judge was permitted to testify as to the subjective basis for a sentence. Additionally, this court's decision in Gardner v. Florida, 430 U.S.

849 (1977), contemplates that a state sentencing judge must disclose his mental processes and "impeach" his sentence if he considered improper evidence. This court should consider also that judges are different than jurors. They are presumed to follow the law and they have an ability to follow the law. Moreover, it is absurd to suggest that had Judge Fuller said that he would not have imposed the death penalty based upon any new evidence submitted, that a federal judge or any court should ignore that declaration³.

³The analogy could be drawn herein to Rule 803 (24) of the Federal Rules of Evidence wherein hearsay is excluded except when it is, "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts. . . ." Certainly in the present case the statement of the sentencing judge as to the effect of new evidence is, as stated in

The present ruling below should therefore
be reversed.

RESPECTFULLY SUBMITTED, on this _____
day of January, 1984, at Tallahassee,
Leon County, Florida.

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Rule 803, "more probative" of the issue
of whether the death sentence should
stand than any other evidence procured by
either party. See also, United States
v. Tucker, 404 U.S. 443, at 542 (1972)
(the Chief Justice and Blackmun, J.
dissenting).

No. 82-1554

In The
Supreme Court of the United States
October Term, 1982

CHARLES E. STRICKLAND, Superintendent, Florida
State Prison; JIM SMITH, Attorney General of Florida,
and LOUIE L. WAINWRIGHT, Secretary, Florida De-
partment of Corrections,

Petitioners,

vs.

DAVID LEROY WASHINGTON,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Former Fifth Circuit (Unit B)

BRIEF AMICI CURIAE OF THE STATES OF ALA-
BAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLO-
RADO, CONNECTICUT, GEORGIA, HAWAII, IDAHO,
INDIANA, KANSAS, KENTUCKY, LOUISIANA,
MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN,
MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA,
NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO,
NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLA-
HOMA, OREGON, PENNSYLVANIA, RHODE ISLAND,
SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE,
UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST
VIRGINIA, AND WYOMING IN SUPPORT OF PETI-
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No. 82-1554

In The
Supreme Court of the United States
October Term, 1982

CHARLES E. STRICKLAND, Superintendent, Florida
State Prison; JIM SMITH, Attorney General of Florida,
and LOUIE L. WAINWRIGHT, Secretary, Florida De-
partment of Corrections,

Petitioners,

vs.

DAVID LEROY WASHINGTON,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Former Fifth Circuit (Unit B)

**BRIEF AMICI CURIAE OF THE STATES OF ALA-
BAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLO-
RADO, CONNECTICUT, GEORGIA, HAWAII, IDAHO,
INDIANA, KANSAS, KENTUCKY, LOUISIANA,
MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN,
MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA,
NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO,
NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLA-
HOMA, OREGON, PENNSYLVANIA, RHODE ISLAND,
SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE,
UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST
VIRGINIA, AND WYOMING IN SUPPORT OF PETI-
TIONERS**

The states noted above, by and through their respec-
tive Attorneys General (see Appendix), appear on behalf
of their citizens and file this brief pursuant to Rule 36.4
of the Rules of this Court.

INTEREST OF AMICI CURIAE

As the chief legal officers of their respective states, these Attorneys General and States Attorneys often represent the correctional administrators of their states in federal habeas corpus actions initiated pursuant to 28 U. S. C. § 2254. Moreover, they have a vital interest in ensuring the integrity of the criminal justice process in their respective states. With ever-increasing frequency they must defend state criminal convictions in federal court against Sixth and Fourteenth Amendment allegations of ineffective assistance of counsel. For these reasons the amici have a substantial and continuing interest in the establishment of consistent and reasonable federal standards for application in cases involving claims of ineffective assistance of counsel.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Eleventh Circuit, sitting en banc, imposed new and unduly burdensome standards for evaluating claims of ineffective assistance of counsel in collateral proceedings by rejecting the sound reasoning of the Florida Supreme Court and the United States District Court, which had both reviewed and rejected the defendant's claim. This case demonstrates how state and federal courts have failed to establish reasonable and consistent methods of analyzing these claims absent further direction from this Court. The Court should adopt a standard that emphasizes the truth-seeking function of the trial by placing the burden of proof entirely on the defendant in collateral proceedings to prove that the acts or omissions of his counsel, which he alleges

to be ineffective, affected the outcome of his trial or the severity of his sentence.

ARGUMENT

I. Introduction

In this case the amici curiae seek the correct standard for federal court review of claims of ineffective assistance of counsel to be applied in collateral proceedings arising out of state court convictions. In light of the total exhaustion requirement of *Rose v. Lundy*, 455 U.S. 509 (1982), the analysis provided by this Court will bear on cases in which state courts have already reviewed and rejected claims of ineffective assistance of counsel. In many cases much time will have elapsed since the convictions. Because these claims are tardy and speculative, they threaten the integrity of our entire criminal justice system, raising the possibility that such claims will materialize in every case in which a conviction has occurred.

State courts should continue to be the primary forum for fair resolution of claims of ineffective assistance of counsel. The administration of criminal justice varies dramatically from state to state, simply because the states face criminal justice problems that vary dramatically with region, population, local economies, etc. A defendant who challenges the adequacy of his or her representation should bear the burden of showing that the claimed inadequacy affected the outcome of the trial. Just as this Court cannot be the final arbiter of every state criminal conviction, lower federal courts should not endure the responsibility of evaluating counsel's representation in every state court conviction according to a complex checklist that may ulti-

mately be relevant to the circumstances of only a fraction of cases.

In keeping with the goals of the criminal justice system this Court must recognize the efficacy of swift and certain adjudication of claims. The burden to provide finality in state criminal convictions rests first with the states, and depends upon comity between state and federal courts. Federal courts should not disturb state court rejections of a defendant's claims without, at the very least, an affirmative showing that the alleged ineffectiveness of counsel affected the outcome of the defendant's trial. The exhaustive review by state courts of federal claims entitles state courts to similar consideration by federal courts. The tide of federal habeas corpus actions denigrates the state judicial process, and threatens federal courts as well. In 1982, nearly 10,000 habeas corpus actions were filed in federal court. Want, *The Caseload Monster in the Federal Courts*, 69 A. B. A. J. 613 (1983).

In several landmark decisions this Court has addressed issues that relate to the requirement of counsel. These decisions have formed a context within which other courts have derived additional rules concerning counsel's performance. Provided herein is a review of several relevant cases, as well as a review of federal and state decisions on counsel's representation, all of which are a backdrop to the essence of the States' argument. This Court must devise a guide which emphasizes scrutiny of the defendant's culpability in place of analysis that simply puts the defense attorney on trial. To do otherwise is to invite "Monday morning quarterbacking" over a defense attorney's performance. The guide which this Court sets forth must

recognize that justice suffers when the state court trial is reduced to a preliminary step in the process of second-guessing a defense attorney's strategy in presenting a client's case.

II. The Right To Counsel

The Sixth Amendment states that, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. In *Powell v. Alabama*, 287 U.S. 45, 71 (1932), the Court held that the Constitution mandated an "effective appointment" of counsel in a capital case. In *Glasser v. U.S.*, 315 U.S. 60, 70 (1942), the Court held that the Sixth Amendment requires that the assistance of counsel in a federal court be "untrammelled" and "unimpaired" by the trial court. This Court later found a presumption of effectiveness of counsel that the evidence in *Michel v. Louisiana*, 350 U.S. 91, 101 (1955), did not overcome. The Court's observations evolved into a set of general rules that have been adopted by state and federal courts. They are:

- (1) all attorneys who are admitted as members of the bar are presumed to be competent, and are presumed to have acted competently in any given situation;
- (2) the fact that counsel was physically or mentally ill, aged, intoxicated, young or inexperienced, does not itself overcome the presumption of effectiveness;
- (3) such facts, however, may be combined with other evidence to establish a claim of ineffectiveness;
- (4) great deference is to be given to the attorneys in the area of trial strategy and trial tactics;
- (5) courts will not judge an attorney's performance on the basis of hindsight; and
- (6) effective representation

does not mean that the lawyer has to be perfect or infallible, or that the defendant has to prevail. 5 Am. Jur. Proof of Facts 2D, Ineffective Assistance of Counsel § 4 (1975).

Gideon v. Wainwright, 372 U.S. 335 (1963), held that the Sixth Amendment guarantee was a fundamental right essential to a fair trial and binding on the states by virtue of the Fourteenth Amendment.

In *McMann v. Richardson*, 397 U.S. 759, 771 (1970), the Court discussed, in dicta, advice given by counsel. For the first time, the Court hinted at an objective standard which trial courts should strive to maintain. The Court commented that whether advice is competent:

depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the *range of competence* demanded of attorneys in criminal cases. On the one hand, uncertainty is inherent in predicting court decisions; but on the other hand defendants facing felony charges are entitled to the effective assistance of competent counsel. Beyond this *we think the matter, for the most part, should be left to the good sense and discretion of the trial courts* with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their court. (Emphasis added.)

The Court further stated, citing *Jackson v. Denno*, 378 U.S. 368 (1964), that a defendant alleging that he was incompetently advised by his attorney and seeking to make a collateral attack in a federal court on a guilty plea in a state court must demonstrate "gross error on

the part of counsel." *McMann*, 397 U.S. at 772. The right to counsel guaranteed by the Sixth Amendment was later extended to all cases in which a defendant may be imprisoned in *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

III. The Burden Of Proving Ineffective Assistance Of Counsel

A. The Federal Circuits.

This Court has not explicitly commented on the allocation of the burden of proof as to prejudice, nor has it applied the harmless error doctrine to ineffective assistance of counsel claims. The issue of allocation of the burden of proof has two separate parts, the showing of ineffectiveness and the showing of prejudice. All courts hold that the defendant must prove acts or omissions on the part of counsel which constitute the rendering of ineffective assistance. The circuits and state courts do not always agree, however, on which party bears the burden of proving whether, and to what extent, the criminal defendant was prejudiced by his counsel's representation. See *Kelly v. Warden, House of Corrections*, 701 F. 2d 311 (4th Cir. 1983), reh'g granted.

The First, Second, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and District of Columbia Circuits have expressly required the defendant to prove the prejudicial effects of his attorney's incompetent assistance. *United States v. Massaro*, 544 F. 2d 547, 551 (1st Cir. 1976), cert. denied 429 U.S. 1052 (1977); *United States v. Joyce*, 542 F. 2d 158, 160 (2d Cir. 1976); *Gray v. Lucas*, 677 F. 2d 1086 (5th Cir. 1982); *Fitzgerald v. Estelle*, 505 F. 2d 1334 (5th Cir. 1974); *Price v. Perini*, 520 F. 2d 807 (6th Cir. 1975),

cert. denied, 423 U.S. 950 (1975); *Matthews v. United States*, 518 F. 2d 1245 (7th Cir. 1975); *Cooper v. Fitzharris*, 586 F. 2d 1325 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979); *United States v. Swallow*, 511 F. 2d 514 (10th Cir. 1975); *United States v. Decoster*, 624 F. 2d 196 (1979) (D. C. Cir.) (en banc), *cert. denied* 444 U.S. 944 (1979); *Stanley v. Zant*, 697 F. 2d 955 (11th Cir. 1983); *Cf. United States v. Cronin*, 675 F. 2d 1126 (10th Cir. 1982) (prejudice inferred from circumstances).

B. The States.

The majority of state courts which have addressed the issue place the burden of showing prejudice upon the defendant though the decisions do not always distinguish the burden of showing ineffectiveness from the burden of showing prejudice. *Lewis v. State*, Ala. Cr. App., 367 So. 2d 542 (1978); *Deason v. State*, 263 Ark. 56, 562 S. W. 2d 79 (1978), *cert. denied*, 439 U.S. 839; *State v. Watson*, 653 P. 2d 351, 355 (Ariz. 1982) (defendant must show counsel's ineffectiveness; state must then show harmlessness beyond a reasonable doubt); *People v. Pope*, 23 Cal. 3d 412, 425 Cal. Rptr. 732, 590 P. 2d 859 (1979); *People v. Myers*, 617 P. 2d 808 (Colo. 1980); *Gentry v. Warden, Conn. Correctional Institution*, 167 Conn. 639, 356 A. 2d 902, 906 (1975); *Knight v. State*, 394 So. 2d 997 (Fla. 1981); *Raymond v. State*, 146 Ga. App. 452, 246 S. E. 2d 461 (1978); *State v. Antone*, 615 P. 2d 101 (Hawaii, 1980); *State v. McKenney*, 101 Idaho 149, 609 P. 2d 1140 (1980); *People v. Greer*, 79 Ill. 2d 103 (1980); *Chandler v. State*, 261 Ind. 161, 300 N. E. 2d 877 (1973); *Sims v. State*, 295 N. W. 2d 420 (Iowa, 1980); *State v. Pencek*, 224 Kan. 725, 585 P. 2d 1052 (1978); *True v. State*, No. 82-297 (Me. 1983); *Lang v.*

Murch, 438 A. 2d 914 (Me. 1981); *Davis v. State*, 40 Md. App. 467, 391 A. 2d 872 (1978); *Commonwealth v. Schlieff*, 5 Mass. App. 665, 369 N. E. 2d 723 (1977); *State v. Powless*, 272 N. W. 2d 258 (Minn. 1978); *Callahan v. State*, 426 So. 2d 801 (Miss. 1983); *Burroughs v. State*, 590 S. W. 2d 695 (Mo. App. 1979); *State v. Rose*, 608 P. 2d 1074 (Mont. 1980); *Lenz v. State*, 97 Nev. 65, 624 P. 2d 15 (1981); *State v. Lang*, 202 Neb. 9, 272 N. W. 2d 775 (1978); *People v. Moore*, 56 App. Div. 2d 877, 392 N. Y. S. 2d 321 (2d Dept., 1977); *State v. Kroepelin*, 266 N. W. 2d 537 (N. D. 1978); *State v. McGuinty*, 97 N. M. 360, 639 P. 2d 1214 (1982); *State v. Lytle*, 48 Ohio St. 2d 391, 358 N. E. 2d 623 (1976); *Kelsey v. State*, 569 P. 2d 1028 (Okla. Crim. 1977); *Rook v. Cupp*, 18 Or. App. 608, 526 P. 2d 605 (1974); *Commonwealth v. Bundridge*, 268 Pa. Super. 1, 407 A. 2d 406 (1979); *State v. Desroches*, 110 R. I. 497, 293 A. 2d 913 (1972); *Kibler v. State*, 267 S. C. 250, 227 S. E. 2d 199 (1976); *State v. McBride*, 296 N. W. 2d 551 (S. D. 1980); *Codianna v. Morris*, 660 P. 2d 1101 (Utah, 1983); *In Re Kasper*, 451 A. 2d 1125, 1126 (Vt. 1982); *State v. Hess*, 12 Wash. App. 787, 532 P. 2d 1173, *affirmed* as qualified on other grounds, 86 Wash. 2d 51, 541 P. 2d 1222 (1975); *State ex rel. Wine v. Bordenkircher*, 230 S. E. 2d 747 (W. Va. 1976); *Spilman v. State*, 633 P. 2d 183 (Wyo. 1981); *Fernandez v. United States*, 375 A. 2d 484 (D. C. App. 1977).

IV. Federal Court Analysis Of Ineffective Assistance Claims

In the past, the Circuit Courts have rarely distinguished direct appeals from collateral attacks in analyzing claims of ineffective assistance of counsel. Instead, they have simply evaluated the targeted acts or omissions

of counsel in light of various nebulous and subjective standards of performance. The standards they apply can be broken down into two basic categories. The first standard is "farce or mockery of justice," a standard still employed in the Second Circuit. *United States v. Bubar*, 567 F.2d 192, 202 (2d Cir. 1977), *cert. denied*, 434 U.S. 872 (1977). Once commonly utilized, this standard has been supplanted by a number of variations of the second standard, "range of competence." This standard evolved from the Court's inquiry in *McMann v. Richardson*, 397 U.S. 759, 771 (1970), concerning whether defense counsel's "advice was within the range of competence demanded of attorneys in criminal cases." See also *Tollett v. Henderson*, 411 U.S. 258 (1973).

Following *McMann*, the First, Third, Fourth, Seventh and Eighth Circuits adopted "range of competence" standards derived from the *McMann* language. The First and Fourth Circuits asked whether counsel's performance was "within the range of competence expected of attorneys in criminal cases." *United States v. Bosch*, 584 F.2d 1113, 1121 (1st Cir. 1978); *Marzullo v. Maryland*, 561 F.2d 540, 543 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978) (en banc as to adoption of *McMann* standard). The Third Circuit adopted a tort standard, applied to professionals in general, which focuses on "the exercise of the customary skill and knowledge which normally prevails at the time and place." *Moore v. United States*, 432 F.2d 730, 736 (3d Cir. 1970) (en banc).

Another variation of the "range of competence" standard, adopted by the Seventh Circuit, "guarantees a criminal defendant legal assistance which meets a minimum standard of professional representation." *United States*

ex rel. Williams v. Twomey, 510 F.2d 634, 641 (7th Cir. 1975), *cert. denied sub nom. Sielaff v. Williams*, 423 U.S. 876 (1977). The Eighth Circuit requires that trial counsel "exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *United States v. Malone*, 553 F.2d 435, 438 (8th Cir. 1977).

Another formulation of the second standard that is frequently used requires that counsel's representation be "reasonably effective." The "reasonably effective" standard also evolved from the language in *McMann v. Richardson*, 397 U.S. 759, 771 (1970), stating that defendants are entitled to the "effective assistance of competent counsel." The "reasonably effective" standard is used in the First, Fifth, Sixth, Ninth, Tenth, Eleventh and D. C. Circuits. The First Circuit held in *United States v. Bosch*, 584 F.2d 1113, 1121 (1st Cir. 1978), that it is sufficient if counsel is prepared and conducts the defense with reasonable knowledge and skill and with an exercise of knowledgeable choices of trial tactics. The First Circuit, therefore, applies both the "range of competence" and "reasonably effective" standards.

The Fifth and Sixth Circuits ask "whether counsel was reasonably likely to render and did render reasonably effective counsel." *Gray v. Lucas*, 677 F.2d 1086 (5th Cir. 1982); *United States v. Gray*, 565 F.2d 881, 887 (5th Cir. 1976); *United States v. Toney*, 527 F.2d 716, 720 (6th Cir. 1975), *cert. denied*, 429 U.S. 838 (1976). The Ninth Circuit states that a defendant must be afforded "reasonably competent and effective defense representation." *Cooper v. Fitzharris*, 586 F.2d 1325, 1328 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979). The

reasonable competence and reasonably effective representation tests are also used in the Tenth and Eleventh Circuits. *Dyer v. Crisp*, 613 F.2d 275, 278 (10th Cir. 1980); *Mylar v. Alabama*, 671 F.2d 1299, 1300 (11th Cir. 1982).

A few courts have attempted to use "specific guidelines" as a basis for evaluating claims of ineffective assistance. The guidelines define acceptable conduct of counsel at trial as well as what conduct is required both before and after trial. The Fourth Circuit adopted this standard in *Coles v. Peyton*, 389 F.2d 224 (4th Cir. 1968), *cert. denied*, 393 U.S. 849 (1968), holding that counsel for an indigent defendant should be appointed promptly, must be afforded reasonable opportunity to prepare a defense, must confer with his client without undue delay and as often as necessary to advise him of his rights and ascertain available and unavailable defenses, and must conduct appropriate factual and legal investigations. In a later decision, *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977), the Fourth Circuit adopted the *McMann* standard, without expressly overruling *Coles v. Peyton*. In *U. S. v. Decoster*, 624 F.2d 196 (D.C. Cir. 1976), the Court rejected the specific guidelines approach advocated by Judge Bazelon in his dissenting opinion.

In the instant case, the Eleventh Circuit has attempted to graft a clumsy, convoluted checklist approach onto their analysis in an attempt to give their rationale the appearance of a more objective process. What the analysis accomplishes, however, is to shift the focus even further from the question of the fairness of the defendant's trial, which is exactly where the focus should remain.

This variety of approaches bears out Justice White's remarks to the Criminal Justice Section of the American

Bar Association last year, in which he noted that the frame of reference for analyzing counsel's conduct is not settled. Nor, he said, is it clear whether prejudice or a likelihood of prejudice must be shown, or indeed "what prejudice" might be in a case of counsel ineffectiveness. *Reports and Proposals*, 31 CRIM. L. REP. (BNA) 2469.

At the present time, the standards for determining error are so broad that the requirement of showing prejudice may be the only part of the analysis that is ultimately useful. In the same vein, prejudice affecting the outcome is the only determination that can be objectively and consistently determined.

... ineffective assistance of counsel claims require a different analysis by reviewing courts than the other sixth amendment cases. In most sixth amendment cases, the reviewing court is presented with an objective problem: either counsel was appointed and allowed to confer with his client or not. The basis of the claim of ineffective assistance, however, requires a more detailed and difficult examination of counsel's efforts and abilities in a specific factual situation. This necessarily amorphous inquiry into counsel's effectiveness calls for demonstration of actual prejudice to the defendant in order to provide relief only in warranted circumstances.

Case Comment, *Decoster III: New Issues in Ineffective Assistance of Counsel*, 70 J. CRIM. L. 275, 287 (1980).

V. Appropriate Standards Of Review

This case presents the Court with the opportunity to resolve the analytical nightmare created by the failure of lower courts to objectify and apply the *McMann* dicta. The Court must recognize the collateral nature of these proceedings and apply the appropriate standards of re-

view utilized in its recent decisions. In *Cupp v. Naughten*, 414 U.S. 141, 144 (1973), the Court granted certiorari to consider whether the giving of a certain jury instruction "so offended established notions of due process as to deprive the respondent of a *constitutionally fair trial*." (Emphasis added.) The Court stated:

Before a federal court may overturn a conviction resulting from a state trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even "universally condemned," but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment.

414 U.S. at 146. Criticizing the analysis employed by the Court of Appeals, the Court went on to say that the lower court's analysis put the "cart before the horse."

. . . the question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.

414 U.S. at 147.

Likewise, lower courts often put the cart before the horse when analyzing claims of ineffective assistance of counsel by quibbling about the advisability of a particular action or omission of defense counsel rather than focusing on the question of whether the alleged error "so infected the entire trial that the resulting conviction violates due process." Moreover, they often fail to heed the Court's admonition in *McNabb v. U.S.*, 318 U.S. 332, 340 (1943):

It must be remembered that review by this Court of state action expressing its notion of what will best

further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction.

This respect for the deliberative judgments of state courts is vital to the effective administration of the criminal justice system.

As this Court stated in *United States v. Agurs*, 427 U. S. 97, 112 (1976), the "overriding concern" is the "justice of the finding of guilt," and, therefore, postconviction relief is warranted only where the defendant is arguably innocent. See also *Hankerson v. North Carolina*, 432 U. S. 233, 239 (1977) (the purpose of the burden of proof is "to prevent the erroneous conviction of innocent persons"); *Stone v. Powell*, 428 U. S. 465, 490 (1976) ("[T]he ultimate question of guilt or innocence . . . should be the central concern of a criminal proceeding").

In *Agurs*, 427 U. S. 97, the defendant alleged that the prosecution's failure to tender criminal records of the victim deprived her of a fair trial as guaranteed by the Due Process Clause of the Fifth Amendment. The Court held that the proper standard of materiality on review by that Court in determining whether *constitutional* error had been committed was whether the omitted evidence created a reasonable doubt of guilt, an *outcome determinative* standard of review. The Court stated that the Court of Appeals had incorrectly interpreted the constitutional requirement of due process. The Court cited *Mooney v. Holohan*, 294 U. S. 103 (1935), where the Court held that in order to justify a *collateral* attack on petitioner's conviction, the petitioner must establish *fundamental unfairness*, i. e., reasonable likelihood that the *outcome* was af-

fectured. *Agurs*, 427 U.S. at 103. The Court also illustrated this underlying principle by citing *Brady v. Maryland*, 373 U.S. 83 (1963), stating:

A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the *outcome* of the trial. (Emphasis added.)

Agurs, 427 U.S. at 104. The *Brady* Court focused on harm to the defendant, stating:

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment. . . .

Brady v. Maryland, 373 U.S. at 87. The *Agurs* Court stated that it was concerned with "elementary fairness," *Agurs*, 427 U.S. at 110.

The mere *possibility* that an item of undisclosed information *might* have helped the defense, or *might* have affected the outcome of the trial, does not establish "materiality" in the *constitutional* sense. (Emphasis added.)

Agurs, 427 U.S. at 109-110. The Court stated that its overriding concern was with the justice of the finding of guilt and that its frame of reference was, therefore, to the context of the entire record. 427 U.S. at 112.

In an even more recent decision involving a collateral attack, *Henderson v. Kibbe*, 431 U.S. 145 (1977), the Court rejected the suggestion that the omission of an instruction on causation "so infected the entire trial that the resulting conviction violated due process." The Court also stated:

The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," [citation omitted], not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned'."

431 U.S. at 154. This Court elaborated on the rationale for so holding by stating in an accompanying footnote:

The strong interest in preserving the finality of judgments, *see, e.g., Blackledge v. Allison*, 431 U.S. 63 (Powell, J., concurring); *Schneekloth v. Bustamonte*, 412 U.S. 218, 256-266 (Powell, J., concurring), as well as the interest in orderly trial procedure, must be overcome before collateral attack can be justified. For a collateral attack may be made many years after the conviction when it may be impossible, as a practical matter, to conduct retrial.

Similar concerns should be recognized in the instant case.

In *Smith v. Phillips*, 455 U.S. 209 (1982), this Court, citing *Brady*, noted that the touchstone of due process analysis is the fairness of the trial. The Court also held that in a federal habeas action, the findings of the trial judge are presumptively correct under 28 U.S.C. § 2254 (d). The Court cited the holding of *Sumner v. Mata*, 449 U.S. 539, 551 (1981), that "federal courts in such proceedings must not disturb the findings of state courts unless the federal habeas court articulates some basis for disarming such findings of the statutory presumption that they are correct and may be overcome only by convincing evidence." 455 U.S. at 218. The *Smith* Court also cited

Chandler v. Florida, 449 U.S. 570, 582-83 (1982), for the principle that "[f]ederal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension."

In *United States v. Frady*, 456 U.S. 152 (1982), the defendant alleged prejudice from a faulty jury instruction. This Court determined the appropriate standard of review and allocation of the burden of proof in a collateral proceeding requires that the defendant "clear a significantly higher hurdle than would exist on direct appeal." 456 U.S. at 166.

The Court reiterated its emphasis that the error must be evaluated in the *total context* of the events at trial. *Frady*, 456 U.S. at 169. The *Frady* Court also stated that it was the *defendant* who had to shoulder the burden of showing not merely that the errors created a *possibility* of prejudice, but that they worked to his *actual* (Court's emphasis) and substantial disadvantage, infecting his entire trial with error of constitutional dimension. 456 U.S. at 170. The Court indicated that there must be a "substantial likelihood" that the outcome would have been affected "to overcome society's justified interests in the finality of criminal judgments." 456 U.S. at 175.

In *Engle v. Isaac*, 456 U.S. 107 (1982), the defendant asserted the unconstitutionality of a rule placing the burden of proving an affirmative defense on criminal defendants. The Court stated "we have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim." 456 U.S. at 134.

The defendant in *United States v. Valenzuela-Bernal*, 102 S. Ct. 3440 (1982), alleged that he was denied due process or the Sixth Amendment right of confrontation because of the deportation of some alien witnesses. The Court held:

Due process guarantees that a criminal defendant will be treated with "that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."

102 S. Ct. at 3449.

CONCLUSION

In evaluating claims of ineffective assistance of counsel, courts must remember:

The purpose of the court is to seek the truth in a manner which provides fundamental fairness to all parties, both the defendant and society. Reliance on theoretical flaws in this truth-seeking process which have no real world consequences defeats the purpose for which the court was created and does a disservice to all parties involved.

Comment, *Ineffective Assistance of Counsel: Who Bears the Burden of Proof?*, 29 BAYLOR L. REV. 29, 48 (1977).

By adhering to the principles of its recent decisions involving collateral attacks, the Court will further restore balance to our federal system, the loss of which has generated so much concern in recent years:

Conviction in the state courts now has become merely the starting point of interminable litigation. State appeals are followed by successive petitions for fed-

eral habeas corpus and successive federal appeals. What is involved is a repetitious, indefinite, costly process of judicial screening, rescreening, sifting, re-sifting, examining and re-examining of state criminal judgments for possible constitutional error. . . . No other nation in the world has so little confidence in its judicial system as to tolerate these collateral attacks on criminal court judgments.

Coub, "The Case Against Modern Federal Habeas Corpus," 57 A. B. A. J. 323, 326 (1971).

The cost of relitigating claims of ineffective assistance of counsel in federal court is great. Narrowing the instances in which the federal courts may discard the reasoned judgments of our state courts with respect to an issue involving so many subjective elements will help restore the public confidence on which the system depends.

The decision of the court below should be reversed and the case remanded for reconsideration of the petitioner's claim of ineffective assistance of counsel under a standard whereby petitioner is required to prove that the actions or omissions of his counsel affected the outcome of his trial or the severity of his sentence.

Respectfully submitted this 18th day of August, 1983.

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NOV 29 1983

ALEXANDER L. STEVAS,

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

CHARLES E. STRICKLAND, Superintendent,
Florida State Prisons, et al.

Petitioner,

—v.—

DAVID LEROY WASHINGTON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FORMER FIFTH CIRCUIT (UNIT B)

**BRIEF OF THE NATIONAL LEGAL AID AND
DEFENDER ASSOCIATION AND THE AMERICAN
CIVIL LIBERTIES UNION, AS AMICI CURIAE
SUPPORTING RESPONDENT**

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Issue Presented

Amici will address the following issue:

WHERE DEFENSE COUNSEL, IN A CAPITAL MURDER PROSECUTION, FAILS TO INVESTIGATE OR PRESENT FAVORABLE EVIDENCE IN MITIGATION AT DEFENDANT'S SENTENCING HEARING, AND THUS RENDERS INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT, MUST THE DEATH SENTENCES BE VACATED BECAUSE THE PROSECUTION CANNOT DEMONSTRATE THAT COUNSEL'S FAILURES WERE HARMLESS BEYOND A REASONABLE DOUBT?

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WHERE DEFENSE COUNSEL, IN A CAPITAL MURDER PROSECUTION, FAILS TO INVESTIGATE OR PRESENT FAVORABLE EVIDENCE IN MITIGATION AT DEFENDANT'S SENTENCING HEARING, AND THUS RENDERS INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT, THE DEATH SENTENCES MUST BE VACATED BECAUSE THE PROSECUTION CANNOT DEMONSTRATE THAT COUNSEL'S FAILURES WERE HARMLESS BEYOND A REASONABLE DOUBT. i

I. BECAUSE THE "REASONABLY EFFECTIVE COUNSEL" TEST IS NO LESS SUBJECTIVE THAN THE "FARCE AND MOCKERY" STANDARD, AND BECAUSE MOST OF COUNSEL'S ERRORS OCCUR IN THE INVESTIGATION OR PREPARATION STAGES OF TRIAL COURT HEARINGS, THIS COURT SHOULD ADOPT OBJECTIVE STANDARDS FOR COUNSEL'S PERFORMANCE OF DUTIES AT THE PREPARATION STAGE . . . 4

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In the Supreme Court of the United States

October Term, 1983

Charles E. Strickland, Superintendent,
Florida State Prisons, et al.,
Petitioners

v.

David Leroy Washington,
Respondent

Interest of Amici

The National Legal Aid and Defender Association (NLADA) is the sole national voice for the overwhelming majority of public defenders, private attorneys and defender clients who make up its defender membership. Representing nearly 600 member public defender offices and about 7,000 individual defenders, NLADA has spoken out on national issues of concern to the legally indigent and their

attorneys in both civil and criminal courts since 1911.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members, founded in 1920, dedicated to preserving and defending fundamental liberties embodied in the Constitution. The ACLU has frequently appeared in this Court to defend the Sixth Amendment's right to counsel, which is indispensable to preservation of other due process rights.

Amici are vitally interested in the principles laid down in this case regarding the duties of counsel, under the Sixth Amendment, and the impact of counsel's ineffective assistance on the fundamental fairness of proceedings, under the Fourteenth Amendment. Our vital interest in the rules to be applied for claims of

ineffective assistance of counsel lead to our involvement in this case.

Amici have obtained and lodged with the Court the written consent of the parties to file a brief in this case.

I

BECAUSE THE "REASONABLY EFFECTIVE COUNSEL" TEST IS NO LESS SUBJECTIVE THAN THE "FARCE AND MOCKERY" STANDARD, AND BECAUSE MOST OF COUNSEL'S ERRORS OCCUR IN THE INVESTIGATION OR PREPARATION STAGES OF TRIAL COURT HEARINGS, THIS COURT SHOULD ADOPT OBJECTIVE STANDARDS FOR COUNSEL'S PERFORMANCE OF DUTIES AT THE PREPARATION STAGE.

Separate tests for the effectiveness of counsel are appropriate under the Fifth and Fourteenth Amendment "due process" clauses and the Sixth Amendment's "assistance of counsel" provision. Under this two-pronged test, the defendant is deprived of the effective assistance of counsel when counsel either is unfairly impaired by external or systemic restraints, or fails to exercise "the skill, judgment and diligence of a reasonably competent defense counsel." United States v. Cronin, 675 F.2d 1126,

1128 (10th Cir. 1982)¹ Mr. Washington asserted in the District Court that his attorney "committed several discrete errors of omission and commission that reasonably effective counsel would not have committed." Pet. App. A.61, See also, Washington v. Strickland, 673 F.2d 879, 885 (5th Cir. 1982). Three death sentences were imposed by the trial court.

¹ This argument for a "duel" approach to ineffectiveness of counsel is fully developed by Amici in another case now pending in this Court, United States v. Cronin, No. 82-660, cert. granted Feb. 22, 1983. Amici in this case do not include the Association of Trial Lawyers of America (ATLA), and the views expressed herein are not endorsed by ATLA.

Amici accept the alternative articulation of the "reasonably competent defense counsel" standard in the opinion of the Court of Appeals below: "Counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances." Pet. App. A 19-20.

No assertion is made regarding unfair impediments or external restraints. Accepting that analysis of counsel's conduct must be conducted under some form of the "reasonably competent counsel" test, this Court must find that Mr. Washington's counsel failed to render reasonably effective assistance of counsel, by virtue of his failure to investigate any potential mitigating evidence prior to defendant's sentencing for capital murder, and by his failure to request or present certain favorable evidence at the sentencing hearing.

Any articulation of the "reasonably competent counsel" test is necessarily subjective, and more objective guidelines or criteria should be applied by this Court to determine whether the error

risers to constitutional magnitude.²
United States v. Cronic, No. 82-660,
Brief of Amici, at 41 et seq. This is
particularly true in the case at bar,
where the failures of counsel were
literally a matter of life and death for
the defendant.

A clear and coherent set of guide-
lines for all cases can be found in
Colorado Supreme Court Justice William H.
Erickson's articulation of the basic
duties of counsel:

² The Government's brief, in both
Cronic and here as Amicus, argues for a
requirement of proof of "serious
derelictions" by counsel to establish a
denial of effective assistance of
counsel. Brief for the United States as
Amicus Curiae, at 26-30. This test is no
less subjective than any manifestation of
the "reasonably competent counsel" test,
and the need for objective criteria
arises even if the Government's test is
adopted.

1. Counsel must diligently and actively participate in the full and effective preparation of his client's case.
2. Counsel has a duty to investigate clearly all defenses of fact and of law that may be available to the defendant.
3. Counsel must confer with his client without undue delay and as often as necessary to elicit matters pertinent to his defense.
4. Counsel should promptly advise his client of his rights and take all actions necessary to preserve them.
5. Counsel should be concerned with the accused's right to be released from custody pending trial, and be prepared, when appropriate, to make motions for a pre-trial psychiatric examination or the suppression of evidence.

Erickson, "Standards of Competency for Defense Counsel in a Criminal Case" 17 Am. Crim. L. Rev. 233, 245 (1979).

A very recent article by Professor Gary Goodpaster develops a more specific set of guidelines and standards for defense counsel in the trial of a capital case. Extrapolating from the various holdings of this Court, Professor Goodpaster concludes his analysis by setting out several necessary rules of conduct for defense counsel:

A capital defendant's trial counsel must:

1. conduct thorough crime and life-history investigations in preparation for both the guilt and penalty phase of the trial;
2. fully inform the client of all available defenses and the potential penalty phase consequences of each defense, and obtain the client's assent to both the guilt and the penalty case to be presented;

3. attempt to rehabilitate members of the venire who seem to be unequivocally opposed to imposition of the death penalty;
4. integrate the guilt phase defense theory and strategy with the projected affirmative case for life at the penalty phase;
5. at the penalty phase of the trial, present all reasonably available mitigating evidence helpful to the defendant.

Goodpaster, "The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases" 58 N.Y.U. L. Rev. 299, 362 (1983) (Emphasis added).

Both the general guidelines, as well as specific, capital-case focused criteria for counsel's performance, are consistent with the holdings of this Court and with well-recognized and even more detailed development of defense counsel's duties.

See ABA Standards for Criminal Justice,
The Defense Function (1981).

Amici do not suggest that detailed standards be developed by the Court, or that already adopted standards be incorporated in toto into the case law. However, the failure to more fully develop a definitional context for "reasonably effective representation" has provided little guidance to lawyers and trial judges, and will encourage further appellate litigation to give contextual meaning to the test.

There is empirical support for the notion that the "reasonably effective counsel" standard is as subjective and vague as the almost universally rejected "farce and mockery" standard used by federal and state courts prior to this Court's decision in McMann v.

Richardson, 397 U.S. 759 (1970), where the Court first made reference to attorney performance within the "range of competence of attorneys in criminal cases," Id. at 770-71.

In anticipation of the issues presented by this case, the National Legal Aid and Defender Association conducted extensive research into the nature and extent of claims of ineffectiveness of counsel in state and federal courts between 1970 and July of 1983.³ That research demonstrates that the claim of ineffectiveness of counsel is no more frequently successful under the "reasonably effective counsel" test than

³ The research is extensively described in the Brief of Amici, pp. 19-25 and Appendix A, United States v. Cronin, No. 82-660.

under the "farce and mockery" standard.

One would assume that if the former test were more stringent than the latter, the progressive adoption of the "reasonably effective counsel" test by state and federal reviewing courts over the past decade would result in greater frequency of relief granted. The study shows no significantly higher incidence of relief, either overall or by trend.⁴

The greatest shortcomings of counsel occur in failure to adequately investigate and prepare the case for trial or other disposition. Our examination of cases with relief granted shows the

⁴ The incidence of relief in death penalty appeals is so tiny as to suggest that reviewing courts will not seriously consider the issue in review of these cases. Even conceding the invalidity of the penalty for part of the decade of the 1970's, our sample showed only 5 reversals of capital cases of about 4,000 cases examined.

following data regarding the point at which counsel's error (or errors) occurred:

Figure 1

Point in Proceedings of Counsel's Error
Resulting in Relief on Grounds of
Ineffectiveness of Counsel

<u>Point in Proceedings</u>	<u>No. of Cases</u>
<u>Pretrial Stage</u>	69
Investigation	22
Preparation	
for trial	21
Motion Practice	19
Late Appointment	7
<u>Guilty Plea</u>	12
<u>Trial</u>	45
<u>Post-Trial/Sentencing</u>	6
<u>Appeal*</u>	20
<u>Lawyer's Legal or</u>	
<u>Ethical Misconduct</u>	8
<u>"General" or Other</u>	
<u>Grounds**</u>	<u>12</u>
TOTAL	172***

* Including failure to properly perfect appeal.

** Includes unspecified or comprehensive action or inaction.

*** Exceeds total cases due to inclusion of some cases in more than one category, as appropriate.

Errors in failure to investigate,
failure to adequately prepare and failure
to file appropriate motions account for
62 instances, or 36%, of the errors
resulting in a grant of relief to defen-
dants represented ineffectively.⁵ This
area, when combined with trial errors,

⁵ The data in our sample are not inconsistent with the only other empirical study of claims of ineffectiveness discovered in this research. Strazzella, "Ineffective Assistance of Counsel Claims: New Uses, New Problems," 19 Ariz. L. Rev. 443, 445 n.8 (1977). Professor Strazzella studied claims made in reported opinions in the federal Courts of Appeal between May, 1963 and May, 1965 and between November, 1969 and November, 1971.

Strazzella's data show an incidence of 282 claims in the second period, an average of 161 per year. Our study showed 1,996 claims in the thirteen and one-half years between 1970 and July, 1983, an average of 148 per year, a slight decline.

Moreover, Strazzella's data show a total of 64% of the claims made in the latter period attacked counsel's performance in "pretrial preparation," "pretrial practice" or "trial."

which are often the result of inadequate preparation, constitutes the overwhelming majority of counsel's errors.

The areas of investigation and preparation cry out for clear and articulate judicial standards of review. These are practice issues, and law school curricula are notoriously weak in training for trial practice, despite the advances in clinical education. Moreover, because of heavy caseloads and statutory limitations on support resources available, public defenders and appointed counsel in state courts, such as counsel in the case at bar, are frequently encouraged, either explicitly or implicitly, to forgo one of the most basic of the attorney's duties - the duty to adequately prepare.

The adoption of clear and objective standards with regard to counsel's duty

to investigate and present favorable evidence would obviate the need for inquiry into the nature or extent of prejudice suffered by the defendant. Most relief comes about because of counsel's failure to prepare, an error of omission. Judging from the relief granted in NLADA's study, it is fair to say that courts are reluctant to speculate as to the negative impact of a failure to perform an essential duty. It is simply impossible to judge, in hindsight, what counsel's complete investigation and presentation would reveal. Without having performed these essential tasks, it is impossible for the reviewing court to fairly conclude that the defendant had his day in court. The adoption of objective standards for preparation would give guidance to counsel and courts, and eliminate the confusion

generated by inquiry into prejudice under current standards.

The "reasonably effective assistance" standard, without more, confuses the issue of the existence of a constitutional error and entirely separate issue of the harm occasioned by that error. Where any variant of the "reasonable competency" standard is utilized, both common sense and case law dictate that harm will not be disregarded in the determination of whether constitutional error has occurred at all. Any harmless mistake is more likely to be found "reasonable" than a mistake which hurts the defendant's case. Lasater, "The Role of Harm in Ineffective Assistance of Counsel Cases: Practice and Policy." 32 Syracuse L. Rev. 759, 785-86 (1981); See Cooper v. Fitzharris, 557 F.2d 1162, 1167 (9th Cir.

1977) (Duniway, J., concurring), rev'd en banc, 586 F.2d 1325 (9th Cir. 1978), cert. denied, 440 U.S. 974 (1979).

No standard for ineffectiveness, subjective or objective, will result in less claims of ineffectiveness. So long as the right exists, it may be expected that defendants will avail themselves of the right to raise the issue, where appropriate. The adoption of clear and specific standards, however, would result in economy of resources of both lawyers and judges at the trial and appellate levels. The more specific standard would give concrete guidance to the trial attorney and the trial judge - a "measuring stick" against which the attorney's conduct could be quantified and measured - and result in less litigation and fewer appeals, particularly on that issue.

The adoption of clear standards to govern counsel's performance in preparation and presentation of criminal cases would provide clear guidance to courts and counsel. Judged against any of the standards described herein, it is clear that counsel's performance here fell below the constitutionally mandated requirement that he be effective. The case must be reversed for a new trial, unless the prosecution can show counsel's errors were harmless.

In the alternative, the case must be remanded to the District Court for additional findings consistent with the criteria developed by the Court of Appeals.

II

IF THE COURT DETERMINES THAT DEFENSE COUNSEL ERRED IN REPRESENTING THE DEFENDANT, REVERSAL OF THE CONVICTION OR SENTENCE FOLLOWS IF COUNSEL'S FAULTY PERFORMANCE HARMED THE DEFENDANT'S CASE. HERE, THE FAILURE OF DEFENSE COUNSEL TO PREPARE OR PRESENT EVIDENCE IN MITIGATION OF A CAPITAL MURDER IS PRESUMPTIVELY PREJUDICIAL.

As demonstrated above, by adopting a general and subjective test of "reasonably effective counsel," this Court will have implicitly imported an element of prejudice into the test itself, since an unreasonable action of ineffective counsel will almost always harm the defendant's case. In fact, to require the defendant to demonstrate both an error of constitutional dimension and serious harm or prejudice which might have altered the outcome of the case in

his favor not only unfairly shifts the burden of proof to the defendant (see III, infra), but alters the essential nature of the test for ineffectiveness.

As to the latter, the temptation is always there to look to the strength of the state's case in making judgments about the defense attorney's action. In context, it may always be possible to fashion some justification for failure to perform competently when the defendant appears factually guilty. Thus, without some articulated minimum standards, a requirement that prejudice be demonstrated is not only duplicative, but strongly implies that defense counsel owes his best effort only to the defendant with a hopeful case. This would fly in the face of the most fundamental of counsel's duties - to represent a client "zealously within

the bounds of the law." ABA Code of Professional Responsibility, Canon 7 (1969). If the defendant must be required to prove his innocence - that is, that a conviction would not have been obtained - there is a serious question as to why the government need provide a competent attorney to represent defendants with weak cases. In fact, a diligent attorney may be able to overcome the most difficult case against his client, an outcome which can never be predicted in reviewing the apparently strong factual case on appeal. See Note, "Identifying and Remediating Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster," 93 Harv. L. Rev. 752, 768-69 (1980).

Moreover, the teaching of Chapman v. California, 386 U.S. 18 (1967) requires

no more than that the defendant establish a denial of a "substantial" constitutional right - here, the right to effective assistance of counsel - to shift the burden to government to show that the violation was harmless beyond a reasonable doubt, a heavy burden indeed. Id. at 23, n.8 and 24. It cannot be gainsaid that the right to effective counsel is no less substantial than the right to counsel itself. The need for the "guiding hand" of competent counsel is the lynchpin of all other procedural rights. If this is true, Chapman would require that the defendant's conviction be reversed once an error of constitutional dimension has been established. This test, followed in the Fourth Circuit for fifteen years, is appropriate and should be adopted by this Court. Coles v. Peyton, 389 F.2d 224,

226 (4th Cir. 1968), cert. denied, 393 U.S. 849 (1968).⁶

Professor Goodpaster suggests that the failure to conduct a reasonable mitigating case investigation in a capital case, or failure to represent reasonably available mitigating evidence, creates a presumption of prejudice:

Counsel will have made many guilt and penalty phase decisions without the benefit of possibly vital information. All of these decisions will have been pervasively, but indeterminably, influenced by having been made without relevant information. Any attempt to assess the effect this lack of information may have had on counsel's decisions would be

⁶ It is also noteworthy that the Fourth Circuit has adopted specific criteria for counsel's performance, including prompt appointment of counsel, adequate opportunity to prepare a defense, adequate consultation, and appropriate investigation and preparation. Id at 226.

pure speculation. Such an assessment would be pure fantasy when applied to the sentencer's decision. The sentencer's ultimate decision is based on innumerable constituent decisions regarding the weight and credibility of witnesses and evidence as well as on many intangible emotional, moral, and psychological factors. Defense counsel's decisions regarding defenses, trial strategy and tactics, and examination and cross-examination of witnesses only partly determine the sentencer's constituent decisions. The ultimate effect on the sentencer's final decision is absolutely indeterminate and indeterminable.

Goodpaster, supra, 58 N.Y.U. L. Rev. at 350-51.

When counsel fails to discover and present merely cumulative mitigating evidence, or when such evidence is omitted by virtue of a tactical choice, the inherent prejudice may be overcome, according to Professor Goodpaster. Id., at 351. These

two areas were exactly within the perimeters of the remand by the en banc court in the Court of Appeals. Pet. App. at 55. These issues would be settled by the action taken by the Court of Appeals, and this Court should affirm the judgment below.

III

THE PROSECUTION MUST BEAR THE BURDEN OF PROOF OF DEMONSTRATING ABSENCE OF HARM, BEYOND A REASONABLE DOUBT, ONCE AN ERROR OF CONSTITUTIONAL DIMENSION HAS BEEN ESTABLISHED.

The Court of Appeals refused to put the burden of proof for prejudice on the government under the Chapman test, reasoning that the error was not "caused" by the state, and that the defendant has more access to the questioned evidence than the state. Pet. App. at 66-70.

These conclusions are unwarranted and illogical. Whether counsel's errors

did or did not result from action by the state is irrelevant; the issue is not whether the government or the defendant were responsible for counsel's actions, but whether the defendant's Sixth Amendment right to effective counsel was violated. Counsel's actions cannot be imputed to the defendant, who asserted the right to counsel because he knew that he was not trained to defend himself, or to make judgments overseeing his counsel's performance. If he were, it could be argued in every case that the defendant "waived" his right to effective counsel by not properly supervising his attorney.

This is no less true in the context of review by federal habeas corpus of state court convictions, where this Court has held that defense counsel has broad

power to forfeit basic rights of the client. Wainwright v. Sykes, 433 U.S. 72 (1977); Engle v. Isaac, 456 U.S. 107 (1982). These cases inpute the lawyer's errors to the defendant because there is an assumption that counsel was acting competently and zealously, well within reasonable boundaries, and that the defendant had his day in court.⁷ When counsel's own effectiveness is challenged, the essential fairness of the adversary process is impugned, and deference can no longer be paid to the

⁷ In fact, a strong implication is raised in both Wainwright and Engle that presumably competent counsel may have attempted to make a shrewd tactical decision in failing to contemporaneously object, thereby waiving the claim in state court while preserving it for federal court action. Wainwright v. Sykes, supra, 433 U.S. at 89-90; Engle v. Isaac, supra, 456 U.S. at 129, n.34.

sanctity of state court proceedings, as was the basis for Wainwright and Engle.

Finally, the absurdity of imputing appointed counsel's errors to a defendant who had no choice in selection of that lawyer is painfully transparent. Such allocation of power is appropriate only if it is assumed that counsel possesses all the requisite characteristics of a "reasonably effective" advocate.

The Court below also asserted that the defendant has greater access to the evidence of prejudice, and so is in a better position to prove prejudice than the state. Pet. App. at 69. This assertion, too, seems almost ludicrous in the face of the fact that the defendant, incarcerated and incapacitated before sentencing, made the questioned evidence

known to his appointed attorney well in advance of sentencing. The issue is not the defendant's access to evidence, but his attorney's failure to act on knowledge of that evidence.⁸

By putting the burden of proof on the defendant to show the evidence would have made a difference (in outcome or otherwise) the Court of Appeals assumes the defendant's guilt until he has proven otherwise. It further assumes the defendant has had a "day in court" and that the

⁸ If burdens are to be allocated based on accessibility to evidence, it may be noted that the government has far greater physical and financial resources to conduct an investigation than any defendant with appointed counsel. In Florida, for example, "reasonable" expenses for investigation are subject to judicial approval. Trial judges are notoriously parsimonious in such awards. See, Fla. Stat. Ann., Sec. 925.035(1) (Supp. 1980).

day was a meaningful one, which is the very question in issue. To presume lack of prejudice would question the underpinnings of the adversary system, the same underpinnings which gave meaning to the establishment of the right to effective assistance of counsel in Powell v. Alabama, 287 U.S. 45 (1938) and Gideon v. Wainwright, 372 U.S. 335 (1963).

IV

IMPOSITION OF AN OUTCOME
DETERMINATIVE TEST FOR PREJUDICE IS
UNCONSCIONABLE AND IMPOSSIBLE TO APPLY IN
MANY STATE COURT CONTEXTS.

Only the D.C. Circuit has adopted the "outcome determinative" test suggested by the Solicitor in both this case and United States v. Cronin. Brief for the United States as Amicus, at 18 et seq. See United States v. Decoster, 624

F.2d 196 (D.C. Cir. 1979), cert. denied, 444 U.S. 944 (1979). Amici urge rejection of this test because it asks reviewing courts to play an inappropriate role as finders of fact, and because the test would be impossible to apply in many state court proceedings, particularly where appointed counsel's behavior may be so abysmal that the record will afford no basis for applying the test.

One of the most salient reasons for not applying this draconian test for prejudice is found in the panel decision in the Court of Appeals, where the court stated:

To require a petitioner to establish a likelihood that the outcome of criminal proceedings would have been altered in his favor had the error not occurred would require that the court. . . put itself in the place of the trial court factfinder in

an attempt to predict with some considerable degree of accuracy what that factfinder would have done had it been presented with different evidence. We think that a framework for analysis which would inevitably require us. . . to engage in such highly speculative re-creations and revisions of trial court proceedings is to be avoided rather than embraced.

Washington v. Strickland, 673
F.2d 879, 901 (5th Cir.
1982)

More importantly, application of this test would jeopardize the unquestionably correct outcome of even those few state court convictions (about 4%, according to our study) which are overturned on appeal due to egregious errors by counsel.⁹ The examples are many, and include the following:

⁹ Obviously, these examples include only reported appellate cases. Many cases undoubtedly go unreported to protect counsel's reputation, or are resolved by appropriate relief in the trial court.

1. Where one deputy public defender had handled the defendant's first degree burglary case for about three months before trial, the trial court forced a new deputy public defender to take the case to trial despite counsel's assertions that he had not prepared or investigated the case. Although the court found prejudice, it did not find the outcome would be different with original counsel. The conviction was reversed and remanded for a new trial. State v. Jackson, 23 Ariz. App. 473, 534 P.2d 281 (1975).

2. The defendant was convicted of armed robbery and sentenced to 20 years imprisonment. At his preliminary hearing, the defendant had been represented by a person posing as an attorney, but not admitted to practice in Tennessee. The re-

viewing court reversed for a hearing in the trial court to determine whether the denial of counsel at preliminary hearing was harmless under Chapman v. California, while noting that "the record permits no reasonable doubt" of the defendant's guilt. McKeldin v. State, 516 S.W.2d 82, 87 (Tenn. 1974).

3. Defendant was charged with robbery, assault and battery and other offenses. Where the primary issue was identification, appointed counsel failed to investigate or present an alibi defense known to him at least eight months in advance of trial. The reviewing court applied a harmless error test for prejudice and concluded that remand for a new trial was required. Had an outcome determinative test been applied, the court may have reached a different result, since it

noted that the jury may have disbelieved the alibi, which was offered by the defendant's girlfriend, "an interested witness." Commonwealth v. Washington, 239 Pa. Super. 336, 346 (1976).

4. Appointed counsel for a defendant charged with malicious assault at least twice failed to make a motion for mistrial based on improper mention to the jury by the prosecutor of defendant's prior convictions. The trial court noted during trial that mistrial was "saved" only by defense counsel's inaction. At a post-trial hearing, counsel asserted that the action was due to his desire not to have to try the case "a third time" due to the economic impact on his practice. The reviewing court noted that the defendant was "victimized by an unsatisfactory system of providing counsel for indigents."

No mention was made as to the nature of the state's evidence. State v. Pelfry, 256 S.E.2d 438, 441 (W.Va. 1979)

5. Four months before defendant's trial for murder, defense counsel requested and received investigative assistance. No written or oral report was prepared by the investigator, and counsel went to trial admitting he had not spoken to any witnesses or conducted any factual investigation. The trial court denied a motion for delay, noting that "this was not a capital case." The reviewing court reversed and remanded, but did not suggest the outcome may have been different, had counsel or his investigator performed their jobs. Flores v. States, 576 S.W.2d 632 (Tex. 1978)

These reported examples demonstrate that the outcome determinative test for

prejudice is not only unduly harsh, but could result in serious miscarriages of justice, if carried to its logical and absurd extreme. The test proposed by Amici is simple, fair and workable and should be adopted by this Court.

CONCLUSION

Appointed counsel failed to perform essential investigatory and preparatory tasks in advance of defendant's capital murder sentencing, and further failed to present viable evidence in mitigation at the penalty hearing. Because these errors amount to deprivation of the defendant's Sixth Amendment right to effective representative by counsel, and because the prosecution cannot demonstrate that these omissions were harmless beyond a reasonable doubt, this matter must be remanded for a new sentencing hearing in state court, or in the alternative, to the District Court for further findings consistent with the holding of the en banc Court of Appeals.

Respectfully Submitted,

Richard J. Wilson, Esq.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1962

CHARLES E. STICKLAND, Superintendent,
Florida State Prison,
Petitioner,

v.

DAVID LEROY WASHINGTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Former Fifth Circuit

NOTION FOR LEAVE TO FILE A BRIEF
AMICUS CURIAE OF
THE WASHINGTON LEGAL FOUNDATION
AND BRIEF OF AMICUS CURIAE
THE WASHINGTON LEGAL FOUNDATION

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QUESTIONS PRESENTED

1. Whether the en banc decision of the former Fifth Circuit Court of Appeals improperly substituted a new standard of its own preference for determining ineffective assistance of counsel claims for the outcome determinative test employed by the Florida courts?

2. Whether the decision of the former Fifth Circuit violates the statutory limits of habeas corpus review and fundamental principles of federalism by encroaching upon the legislative authority of the state courts to interpret and enforce the state's carefully crafted capital sentencing procedure?

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1554

CHARLES E. STRICKLAND, Superintendent,
Florida State Prison,
v. *Petitioner,*

DAVID LEROY WASHINGTON,
Respondent.

**On Writ of Certiorari to the United States Court of Appeals
for the Former Fifth Circuit**

**MOTION OF THE WASHINGTON LEGAL FOUNDATION
FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE***

The Washington Legal Foundation (WLF or Foundation) moves this Court pursuant to Supreme Court Rule 42 for leave to file the annexed brief *amicus curiae* in support of Petitioner's position in the case at bar. Petitioner consented to WLF's participation, but counsel for Respondent refused.

The Washington Legal Foundation is a nonprofit public interest law firm organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF, which has offices in Washington, D.C. and Dallas, Texas, has more than

85,000 members and 120,000 supporters throughout the United States whose interests the Foundation represents.

WLF participates in and devotes a substantial portion of its resources to matters raising criminal justice and related constitutional issues. The Foundation's concern for the physical, psychological and financial impact crime has on its victims, their families, and society has led to the establishment of its Crime Victims Program, Death Penalty Project, and Court Watch Project. These programs are designed to advance the rights of crime victims and law-abiding citizens whose interests are too often ignored by the institutions which administer the criminal justice system. Among other activities, WLF provides legal assistance, guidance, and educational materials to the victims of violent crime and their families and participates in court cases with broad public interest implications.

As part of its Death Penalty Project, WLF has appeared as *amicus curiae* in the following death penalty cases before this Court: *Barefoot v. Estelle*, 51 U.S.L.W. 5189 (July 6, 1983); *Enmund v. Florida*, — U.S. —, 102 S. Ct. 3368 (1982); *Zant v. Stephens*, — U.S. —, 102 S. Ct. 1856 (1982); *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The Foundation is also presently participating in a death penalty case before the United States Court of Appeals for the Fifth Circuit, *O'Bryan v. Estelle*, No. 82-2422 (5th Cir. 1982).

In addition, WLF attorneys have testified before the U.S. Congress on capital punishment issues, *see, e.g., Hearings on H.R. 5679 Regarding A Federal Death Penalty Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 97th Cong., 2d Sess. (1982) (statement of the Washington Legal Foundation), and regularly debate opponents of capital punishment in a variety of public forums.

In the instant case, the Washington Legal Foundation seeks to advance the interests of its members and the pub-

lic by addressing some of the broader legal and policy issues implicated in determining the appropriate standard to evaluate ineffective assistance of counsel claims in habeas corpus proceedings. The decision here will ultimately affect the right of State legislatures, courts and juries to impose and enforce capital sentences. Years have passed since David Leroy Washington was convicted and sentenced to death for three of the most brutal murders in Florida history. In this regard, the case at bar is typical of all recent capital punishment litigation in which the States' interest in the finality of their judgments has been consistently and blatantly undermined by endlessly imaginative federal appeals.

The Washington Legal Foundation can bring to this case a perspective not presently represented. Accordingly, the Foundation respectfully requests permission to participate as *amicus curiae*.

Respectfully submitted,

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August 18, 1983

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

No. 82-1554

CHARLES E. STRICKLAND, Superintendent,
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v. *Petitioner,*

DAVID LEROY WASHINGTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Former Fifth Circuit

BRIEF OF *AMICUS CURIAE*
THE WASHINGTON LEGAL FOUNDATION

INTERESTS OF *AMICUS CURIAE*
THE WASHINGTON LEGAL FOUNDATION

The interests of *amicus curiae* Washington Legal Foundation (WLF or Foundation) are set forth in the foregoing motion for leave to file a brief *amicus curiae*.

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus curiae* Washington Legal Foundation adopts for the most part the recitation of facts in Petitioner's Brief. However, it is useful to recount the facts which are particularly material to the substantive legal and policy issues presented here.

On September 20, 1976, following carefully arranged plans, Respondent, David Leroy Washington, stabbed to death Daniel Pridgen, a minister, while an accomplice restrained the victim and covered his face with a pillow. Three days later, in the presence of three helplessly bound elderly sisters-in-law, Respondent murdered Mrs. Katrina Birk by stabbing her and shooting her in the head. Washington then attacked the sisters-in-law inflicting serious, permanent, and in one case, mortal injuries. Finally, on September 29, Respondent murdered Frank Meli, a twenty-year-old college student whom he had kidnapped two days before. While Meli was tied spread-eagled to a bed, Washington stabbed him eleven times. Although an accomplice had covered Meli's face with a pillow, Respondent stated he heard his victim repeat the Lord's Prayer over and over during the fatal attack.

After confessing and pleading guilty to the three murders, Respondent Washington was tried and convicted in the Dade County Circuit Court before Judge Richard Fuller. At the sentencing hearing on December 6, 1976, Judge Fuller sentenced Respondent to death on each of the three counts of first degree murder. While Respondent's attorney, William Tunkey, argued that Respondent's remorse and willingness to face the consequences of his crimes should persuade the court to impose life imprisonment, the judge found that the aggravating factors in the case overwhelmed any of the mitigating factors present.

Respondent collaterally attacked the judgment, citing a myriad of constitutional violations, all of which were dismissed in the Florida Circuit Court, the Florida Supreme Court, and the Federal District Court. It was only in the former Fifth Circuit Court of Appeals that one of Respondent's constitutional claims, ineffectiveness of counsel, was declared valid. This Court granted certiorari. 51 U.S.L.W. 3871 (June 6, 1983).

SUMMARY OF ARGUMENT

The former United States Court of Appeals for the Fifth Circuit improperly rejected the test developed by the courts of the State of Florida for evaluating ineffective assistance of counsel claims. The federal court's actions constitute both a blanket denial of the State's legitimate authority to develop such a standard for state prisoners and a thinly disguised effort to require an allocation of burden more in line with its own philosophical predilections. The test employed by Florida, as set forth in *Knight v. State*, 394 So.2d 997 (Fla. 1981), and reaffirmed recently in *Armstrong v. State*, 429 So.2d 287 (Fla. 1983), properly determines whether a sixth amendment violation is serious enough to require judicial remedy and focuses on the likelihood of impact on the outcome of the judicial proceedings. Therefore, it permits an assessment of whether Respondent received a full and fair adjudication of his claims.

Moreover, the lower court violated the statutory limits of habeas corpus review and established principles of our federalist system in reversing the denial of Respondent's petition for writ of habeas corpus. The court need not have considered Respondent's claim of ineffective assistance of counsel since the claim could have been dismissed on the doctrine of adequate state grounds. The component of prejudice, necessary to sustain Respondent's sixth amendment claim, is a matter interwoven in Florida's death penalty statutes and was thoroughly disproved in the state courts. This deliberate encroachment upon the authority of the Florida courts evidences a lack of respect for state judgments and undermines the principle of finality of litigation. It thereby diminishes the death penalty's value as a deterrent, devalues the efforts of the Florida bench, and contributes as a whole to the erosion of public confidence in the criminal justice system. If upheld, the Court of Appeals' unwarranted intrusion into Florida's enforcement of its criminal code can only serve as precedent for the continuing abuse of habeas corpus review of capital punishment cases.

ARGUMENT

I. THE EN BANC DECISION OF THE FORMER FIFTH CIRCUIT COURT OF APPEALS IMPROPERLY SUBSTITUTES A NEW STANDARD OF ITS OWN PREFERENCE FOR DETERMINING INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS FOR THE OUTCOME DETERMINATIVE TEST EMPLOYED BY THE FLORIDA COURTS

The en banc decision of the court below improperly substitutes a new formulation for determining ineffective assistance of counsel claims for the outcome determinative test of *Knight v. State*, 394 So.2d 997 (Fla. 1981), employed by the courts of the State of Florida. The new standard "articulated" in the majority opinion cannot be justified. The Florida Supreme Court possesses primary authority for developing a standard to evaluate claims of ineffective assistance of counsel. As this Court explained in *McMann v. Richardson*, 397 U.S. 759 (1970) :

[D]efendants facing felony charges are entitled to the effective assistance of competent counsel. Beyond this we believe the matter . . . *should be left to the good sense and discretion of the trial courts* with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.

Id. at 771. Based upon this express authority, the Florida bench has carefully developed and consistently applied the ineffective assistance of counsel standard set forth by its highest court in *Knight* and, absent fundamental error of a constitutional dimension in the application of that standard, a federal court lacks the authority to interfere with the state's decision. To hold otherwise sanctions

wholesale disregard of state court discretion. Moreover, it sets up the federal courts as super trial courts able to dictate every facet of a state court system's criminal justice policy on a case-by-case basis aided by 20-20 hindsight. Hence, the decision of the former Fifth Circuit Court of Appeals must be reversed.

A. The Outcome Determinative Test Set Forth In *Knight* Provides An Effective Means Of Assessing The Fundamental Fairness of Respondent's Sentencing And Serves To Appropriately Limit The Scope Of Habeas Corpus Relief

The Florida courts employ an appropriate and constitutionally sound test for adjudicating ineffective assistance of counsel claims. Expanding upon principles developed in *Meeks v. State*, 382 So.2d 673 (Fla. 1980), and *United States v. DeCoster*, 624 F.2d 196 (D.C. Cir. 1979) (en banc), Florida carefully constructed a four-step test to determine whether a defendant has been denied reasonably effective assistance of counsel in *Knight v. State*, 394 So.2d 997 (Fla. 1981). The *Knight* test, as recently summarized with approval by the Florida Supreme Court, provides that:

... the challenger must detail in his pleading the specific omission or overt act upon which the claim of ineffective assistance of counsel is based. Second, the defendant must show that the act or omission was a substantial and serious deficiency measurably below the standard of competent counsel. Third, the defendant must show that the deficiency, viewed under the circumstances, *probably affected the outcome of the proceeding*. Finally, the defendant's showing of substantial, prejudicial deficiency must withstand the state's attempt at rebuttal. Such rebuttal may be achieved by showing beyond a reasonable doubt that there was no prejudice in fact.

Armstrong v. State, 429 So.2d 287, 290 (Fla. 1983) (emphasis added). The Court of Appeals takes issue

with the third step of Florida's test; that is, the burden placed on the defendant to demonstrate the likelihood that the alleged ineffectiveness of counsel affected the outcome of the decision against him.

The majority chooses to substitute its own formulation of the appropriate ineffective assistance of counsel standard and in doing so draws a "bright constitutional line between what the Florida Supreme Court, several district courts in [the former Fifth] circuit, and other courts have found constitutionally acceptable." *Washington v. Strickland*, 693 F.2d at 1288 (Roney, J., dissenting). Specifically, the test it proffers would require the defendant to show that ineffective assistance of counsel resulted in "actual and substantial *disadvantage* to the course of his defense." *Id.* at 1262 (emphasis added). Upon a showing of "disadvantage", the ultimate burden of demonstrating that "any Constitutional error that did occur was harmless beyond a reasonable doubt" would then rest upon the State. *Id.*

The federal appeals court professes to base its new formulation on a recent explication by this Court of the prejudice portion of the "cause and actual prejudice" standard governing relief on collateral attack following procedural default at trial. *United States v. Frady*, 456 U.S. 152 (1982). *Frady* involved the collateral attack of a federal prisoner alleging erroneous jury instructions in a trial 19 years prior to which no contemporaneous objection was made. *Amicus* contends that such extrapolation is misplaced here and only confuses the instant issue by relying exclusively on case law involving guilt phase determinations rather than sentencing determinations.

Further, the en banc opinion of the former Fifth Circuit incorrectly characterizes the *DeCoster* and *Knight* burden allocation as imposing an overly harsh burden upon Respondent to prove that the sentencing decision would be different on retrial. *Washington v. Strickland*,

693 F.2d at 1261. The former Fifth Circuit selectively builds upon a dissenting opinion in *Wright v. Estelle*, 572 F.2d 1071 (5th Cir. 1978), which stated in pertinent part that "one suffering inadequate counsel need not show to receive a new trial that adequate counsel would change the result on retrial" and summarily declares that the *DeCoster* test requires such a showing. *Id.* at 1084. Contrary to the circuit court's allegation, *DeCoster* does not mandate such proof. *DeCoster* and *Knight* require only that petitioner establish the *possibility* that attorney error *harmed* the outcome of his trial. This burden is fundamentally different—and less difficult—than forcing the defendant to *prove* that the sentence imposed would have been more lenient.

The court below continues its deliberate assault on the Florida test by pointing out that the defendant "is no better situated than the State to demonstrate that . . . additional evidence was likely to alter the outcome of the case." 693 F.2d at 1262. Therefore, the court subjectively concludes that it would be somehow unfair to burden the defendant with any additional requirement:

We believe that where the petitioner has shouldered the considerable burden of showing a violation of his sixth amendment rights that resulted in actual and substantial disadvantage to his case, it is inequitable to encumber him with the further responsibility of showing that the disadvantage determined the outcome of the entire case.

Id. (emphasis added). Thus, upon mere belief, akin to a gut feeling and unbuttressed by direct legal precedent, the federal appeals court rejects Florida's test for determining ineffective assistance of counsel and substitutes a new test which is apparently more in line with what it believes is necessary.

While recognizing that the state does not enjoy a superior vantage point in demonstrating likelihood of impact on outcome, the former Fifth Circuit fails to

offer a principled argument for relaxing the burden placed on petitioner. It requires only a showing of "actual and substantial disadvantage" to the course of the defense. 693 F.2d at 1263. *Amicus* fails to see where the en banc test differs substantially from the panel test which it so completely (and appropriately in our opinion) disparages. *Id.* at 1262. Holding petitioner to a showing of "substantial disadvantage" is simply a semantic inversion of the panel's formulation: "but for his counsel's ineffectiveness his trial, but not necessarily its outcome, would have been altered in a way helpful to him [to his advantage]." *Washington v. Strickland*, 673 F.2d 879, 902 (5th Cir. 1982). As such, it is subject to the same criticism set forth by this Court in *United States v. Valenzuela-Bernal*, 102 S. Ct. 3440 (1982): "To us, the number of situations which will satisfy this test is limited only by the imaginations of judges or defense counsel." *Id.* at 3446.

A greater burden on Respondent is justified and the *Knight* standard of burden allocation essentially represents the State's reasonable efforts to stem the tide of unwarranted habeas corpus reversals. In the majority of cases, it is impossible to point with certainty to the precise role an attorney's substandard performance played in the outcome of the trial. Additionally, this Court has definitively found that certain violations of the right to counsel may be disregarded as harmless error. *United States v. Morrison*, 449 U.S. 365 (1981); *Chapman v. California*, 386 U.S. 18, 23 (1967). Thus, it cannot be an undue burden to require the habeas corpus petitioner to show at least a *likelihood* that attorney ineffectiveness has some impact on the outcome of the proceeding¹ and this is precisely what Florida's *Knight* test requires.

¹ The *Knight* burden allocation standard is further consistent with case law requiring a much heavier burden of proof to support a collateral attack than that necessary for a direct appeal. *Bruce v. United States*, 379 F.2d 113 (1967); *United States v. Frady*, 456 U.S. 152, 165-66 (1982).

B. The Decision of the Former Fifth Circuit Court Of Appeals Is Too Dangerously Speculative To Warrant Acceptance By This Court

The former Fifth Circuit's formulation of an ineffective assistance of counsel test is too dangerously speculative to warrant acceptance by this Court. The lower court fails to practically or effectively define and limit "actual and substantial disadvantage" in a way which sufficiently forecloses endless and frivolous appeals. Instead, the circuit court baldly claims that the burden of showing disadvantage "is of sufficient magnitude to discourage the filing of insubstantial claims and to focus the attention of the district court on the actual harm suffered by the petitioner as a result of his counsel's performance." 693 F.2d at 1262. *Amicus* submits that the recent history of death penalty litigation underscores the error of the lower court's assumption. "Disadvantage" is essentially an open-ended term devoid of objective boundaries and its adoption as a standard will not only serve to sanction judicial subjectivity as the basis of granting habeas corpus relief, but initiate a flood of ineffective counsel claims.

II. THE DECISION OF THE FORMER FIFTH CIRCUIT VIOLATES THE STATUTORY LIMITS OF HABEAS CORPUS REVIEW AND FUNDAMENTAL PRINCIPLES OF FEDERALISM BY ENCROACHING UPON THE LEGISLATIVE AUTHORITY OF THE STATE COURTS TO INTERPRET AND ENFORCE THE STATE'S CAREFULLY CRAFTED CAPITAL SENTENCING PROCEDURE

The Former Fifth Circuit traversed the parameters of habeas corpus review and breached fundamental principles of federalism by elevating the merits of Respondent's frivolous claim to expostulate an irrelevant treatise on the constitutional requirements of effectiveness of counsel. This Court, in defining the limits of habeas corpus review, recently acknowledged that:

The states possess primary authority for defining and enforcing criminal law. . . . Federal intrusions

into state criminal trials frustrate both the states' sovereign power to punish offenders and their good faith attempts to honor constitutional rights.

Engle v. Isaac, 456 U.S. 101, 128 (1982). Yet, in recent years, the federal writ of habeas corpus has been so overextended that the judgments of state courts have been depreciated and the initiative of state court judges has been frustrated. The eagerness of federal courts to strike down state court determinations in order to expound their own theories of criminal justice has been time and again demonstrated. This proclivity of the federal courts is especially pronounced in capital punishment cases where federal collateral challenges to state court death sentences are accorded credence as a matter of course. If a state prisoner can convince even one federal judge to second guess the state court determinations below on any one of the myriad of constitutional claims that now routinely arise in a typical capital case, his conviction can be vacated. The Washington Legal Foundation contends that the overextension of habeas relief for state "death-row" defendants is epitomized by the en banc opinion of the former Fifth Circuit. WLF also submits that the decision is motivated by a mistrust of the ability of state court judges to provide fair and competent forums for the meaningful adjudication of federal rights and an ideological bias against the imposition of the constitutionally sound death penalty. Therefore, this Court should reverse the decision of the Court of Appeals.

A. The Fifth Circuit Erroneously Reversed the District Court's Denial of Habeas Corpus Relief Since Respondent's Constitutionally Guised Claim Was Properly Dismissed On Adequate State Grounds By The Florida Courts

Respondent's claim that his constitutional rights were violated through his counsel's failure to present nonstatutory mitigating evidence at the sentencing phase of his trial cannot be sustained absent a showing that the al-

leged omissions unduly and unfairly prejudiced his case. Even the former Fifth Circuit acknowledged in its opinion that a criminal defendant must demonstrate that the alleged act or omission of counsel prejudiced the defendant in order for it to rise to the level of constitutional error. *Washington v. Strickland*, 693 F.2d at 1264 n.33. See also *Washington v. Watkins*, 655 F.2d 1346, 1360 (5th Cir. 1981); *United States v. Winston*, 613 F.2d 221, 223 (9th Cir. 1980); *Beran v. United States*, 580 F.2d 324, 326 (8th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979).² Thus, even if the omissions of Respondent's counsel at the sentencing phase of his trial are determined to have been inadequate, there *must still* be a showing that Respondent was unduly and unfairly prejudiced thereby. *Washington v. Watkins*, 665 F.2d at 1360.

The question of prejudice arising from the failure of Respondent's counsel to produce mitigating evidence is a question which is interwoven in Florida's substantive capital sentencing statutes and which was clearly considered and rejected by both the Florida appellate courts. Pursuant to Fla. Stat. Section 921.141 (Supp. 1976-1977), the trial court is to determine the sentencing profile of a criminal defendant convicted of first degree murder. The court examines and weighs the aggravating and mitigating circumstances surrounding the crime and the defendant in order to determine whether the death penalty should be imposed. Fla. Stat. Section 921.141(6).

² This Court has held that in some instances the prejudice component is presumed regardless of whether it was independently shown. *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978). However, *Holloway* involved a situation in which a trial court improperly required joint representation of co-defendants by one attorney over a timely objection and in effect deprived one of the defendants of the presence of counsel. When a defendant is deprived of the presence of his attorney in the prosecution of a capital offense, reversal is automatic. *Gideon v. Wainwright*, 372 U.S. 335 (1963). In the instant case, Respondent does not claim he was deprived of counsel, but that counsel ineffectively represented him.

The trial court discerns Florida's sentencing policy as it applies to each particular defendant through its knowledge of the language and legislative history of the death penalty statute as well as past sentencing decisions in cases presenting profiles similar to the defendant. See *Washington v. Strickland*, 693 F.2d at 1275 (Tjoflat, J., specially concurring).

The Florida Supreme Court has determined that the process of weighing aggravating and mitigating circumstances to formulate a criminal defendant's sentencing profile as categorized in Fla. Stat. Section 921.141 is a matter of *substantive* state law. *Morgan v. State*, 415 So.2d 6, 11 (Fla. 1982). In *Morgan*, petitioner argued that Section 921.141 seeks to regulate matters of criminal trial and procedure which are exclusively the province of the Supreme Court of Florida under the rulemaking power assigned to it by Article V, Section 2(a), Fla. Const. The State Supreme Court disagreed and held that the aggravating and mitigating circumstances of the statute (Section 921.141), when read in conjunction with Fla. Stat. Sections 782.04 and 794.01, actually *define* those crimes to which the death penalty is applicable or inapplicable. *Id.* Thus, it follows that any question of prejudice arising from an attorney's failure to introduce evidence that would qualify as a nonstatutory mitigating circumstance is a question of determining the effect the omitted evidence would have on the original sentencer, and hence a matter of state substantive law. For these reasons, *amicus* contends that the determination of prejudice is strictly reserved to state courts in collateral attacks on a death penalty sentence on the basis of ineffectiveness of counsel.

The record in the case at bar demonstrates that Respondent's claim of prejudice was thoughtfully and thoroughly disposed of at the state level. In accordance with the applicable state statutes and case precedent, the Florida Circuit Court imposed three sentences of death for the three

brutal murders for which Respondent had been convicted. The death sentences were upheld on direct statutory appeal. *Washington v. State*, 362 So.2d 658 (Fla. 1978), *cert. denied*, 441 U.S. 937 (1979). Respondent's post conviction motion incorporated all the mitigating evidence that he alleged was incompetently omitted at his sentencing hearing. The Florida circuit court, *assuming that allegations of Respondent's motion and the affidavits he presented in mitigation were true*, found that he nonetheless failed to establish a *prima facie* showing of prejudice. The court held that:

As a matter of law, the record affirmatively demonstrates beyond any doubt that even if Mr. Tunkey [Respondent's counsel] had [presented the new mitigating evidence] at the time of sentencing, there is not even the remotest chance that the outcome would have been different. The plain fact is that the aggravating circumstances proved in this case were completely *overwhelming* and even to this date the [Respondent] cannot show that any statutory mitigating circumstances which he claims his attorney failed to investigate and present at the time of sentencing would as a matter of law, be insufficient to outweigh the multiple aggravating circumstances present in this case.

Washington v. Strickland, 693 F.2d at 1267.

On appeal, the Florida Supreme Court rejected the necessity of a hearing and affirmed the lower court's decision, finding that Respondent had failed to make a *prima facie* showing of possible prejudice and failed to such a degree the court believed "*to a point of moral certainty*" that Washington was entitled to no relief. *Washington v. State*, 397 So.2d at 287 (emphasis added). From a review of these proceedings, it is clear that the Florida courts, intimately aware of their own state's sentencing policy, properly dismissed Respondent's claim of prejudice.

The Fifth Circuit, in reversing the denial of Respondent's petition, usurped Florida's legitimate role as the administrator of its death penalty statute and breached established principles of federalism since the claim of ineffectiveness of counsel was resolved on adequate state grounds in the Florida courts. A state prisoner is only entitled to habeas corpus relief if he or she is held "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. Section 2254 (1948). In *Henry v. Mississippi*, 879 U.S. 443 (1964), this Court held that federal courts should decline to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions. *Henry* involved an issue of state criminal procedure—whether a failure to make a contemporaneous objection to the admission of evidence caused a loss of Henry's right to challenge the illegal seizure of the evidence. This Court distinguished *Henry* by noting that, "where the ground involved is *substantive*, the determination of the federal question cannot affect the disposition if the state court decision on the state law question is allowed to stand . . . we have no power to revise judgments on questions of state laws."³ *Id.* at 446-47 (emphasis added). Since the normative decision of the state courts that death was the appropriate sentence for Respondent based on his sentencing profile is binding on federal courts, the former Fifth Circuit faced with the same sentencing profile, should have ruled that Respondent could not possibly sustain his claim of prejudice and dismissed the petition for failure to state a claim for re-

³ In *Wainwright v. Sykes*, the Court adopted a "cause" and "prejudice" test to determine the extent to which *procedural* default in the state courts will preclude a federal habeas corpus consideration of an issue affected. However, this Court upheld the doctrine of adequate and independent state grounds as a "well established principle of federalism" and stipulated that "a state decision resting on adequate foundation of state *substantive law* is immune from review in the federal courts." 433 U.S. 72 at 81 (1977) (emphasis added).

lief. See *Washington v. Strickland*, 693 F.2d at 1279 (Tjoflat, J., specially concurring).

**B. Public Interest Concerns Dictate The Reversal Of
The Circuit Court's Decision To Grant Respondent
Habeas Corpus Relief**

The en banc decision of the former Fifth Circuit overstepped the boundaries imposed by the federal habeas corpus statute, 28 U.S.C. § 2254, and failed to accord proper deference to the judgments of the Florida courts and the state's interest in the finality of those judgments. As a result, the decision diminishes the death penalty's value as a deterrent, undermines the morale of Florida judges, and contributes to the erosion of public confidence in the criminal justice system.

Justice Powell stated in *Schneekloth v. Bustamonte*, 421 U.S. 218 (1973) (Powell, J., concurring) that:

At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view for resurrecting every imaginable basis for further litigation.

Id. at 262. However, frequent abuse of habeas corpus relief clearly results in a population of prisoners who never confront the fact of their guilt or the inevitability of punishment for their crimes. As presently employed, federal collateral review of a conviction too often serves only to extend the ordeal of the trial for both society and the accused and frustrates legitimate state and societal expectations of justice by undermining the principles of finality of litigation. See *Engle v. Isaac*, 456 U.S. 107, 126-127 (1982).

The instant case serves as a good example. No question exists as to Respondent's guilt or to the heinous nature of the crimes which led to the imposition of his capital sentence. Nonetheless, his identical claims were reviewed

and re-reviewed by a number of courts until one tribunal finally accepted the oft-rejected arguments. Tolerating such extensive efforts to undo valid state judgments lends force to the proposition that a criminal conviction is *never* final until the creativity of a convict or his counsel is thoroughly exhausted. As a result, the appeals process in capital cases now moves in glacial time.

The former Fifth Circuit has helped to endlessly prolong the imposition of Respondent's sentence and, concomitantly, diminish the value of the Florida death penalty statute as a deterrent. This Court has described the Florida death penalty statute as intending, "to provide maximum deterrence [and] fair warning of the degree of culpability which the state ascribe[s] to the act of murder." *Dobbert v. Florida*, 432 U.S. 282, 297 (1977). However, deterrence depends upon the expectation that those who violate the law will swiftly and surely become subject to just punishment after reasonable review of claims of constitutional irregularity. By refusing to give deference to the four Florida court proceedings that determined both Respondent's guilt and appropriate sentence (as well as a similar proceeding in the federal district court), the Court of Appeals contributes to and, more importantly, exacerbates, the "death-row log jam" that makes such a mockery of capital punishment today.

Furthermore, the lower court undermines the morale of state judges as a whole in resurrecting Respondent's ineffectiveness of counsel claim. In *Engle v. Isaac*, *supra*, Justice O'Connor explicitly recognized the deleterious effect of such unnecessary federal court intervention in state criminal justice processes:

Over the long term, . . . , federal intrusions may seriously undermine the morale of our state judges. As one scholar has observed, there is "nothing more subversive of a judge's sense of responsibility, or the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging

well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else." Bator, *supra*, n.32, at 451. Indiscriminate federal intrusions may simply diminish the fervor of state judges to root out constitutional errors on their own.

456 U.S. at 128 n.33.

The effect here is two-fold. First, by nullifying state judicial discretion, the federal courts stifle healthy experimentation on the state court level. It has long been recognized that one of the distinct advantages of our federal system is that a single courageous state may serve as a laboratory for testing novel solutions to the social and economic challenges facing government bodies. Experiments on the state level which do not work can be more easily changed than those instituted on the national level and successful experiments can be readily adopted by other states on a firmer basis.

The comprehensive death penalty statute enacted by the legislature of Florida and applied by its courts is an expression of the principled public policy of the state regarding the appropriate punishment due in certain circumstances and represents a good faith (and successful) effort to meet the commands of this Court and the interests of the criminal defendant. See *Armstrong v. State*, 429 So.2d 287 (Fla. 1983). Such responsible efforts to fight crime and deter criminal conduct by state courts should be encouraged rather than dismissed on the federal level. Moreover, it must be borne in mind that state court judges, no less than their federal counterparts, take an oath to support and defend the United States Constitution. No reason exists to presume that state judges are any less committed or less sensitive to constitutional guarantees due the criminal defendant than federal judges. See *Younger v. Harris*, 401 U.S. 37 (1971).

Secondly, the absence of finality and increasing federal intrusion result in the erosion of public confidence in the criminal justice system. As the Chief Justice of the Su-

preme Court of Alabama argued, "we cannot expect the public to give any state court system the maximum respect and support it needs when the decisions of the highest court of the state are routinely subject to being reviewed and overturned by a single federal court judge. . . ." Torbent, C.J., Statement before the Subcommittee on Courts of the U.S. Senate Committee on the Judiciary in Support of Senate 653 (December 1981). So long as state judgments do not command the respect of federal courts, *amicus* submits they cannot command the respect of the public. The overextension of the writ of habeas corpus engenders disrespect for the criminal justice system as a whole as well as for state court systems. It reinforces the pervasive belief among state judges, lawyers, and the public at large that, due to the existence of Section 2254, state death sentences are merely a "tryout on the road" for what will later be the "main event"—the determinative federal habeas proceeding. *Wainwright v. Sykes*, 433 U.S. at 90.

Finally, it is instructive to return to the historical foundations of the Great Writ in order to more fully understand the abuses to which it is being subjected. The writ of habeas corpus was originally intended to be an extraordinary writ utilized on those *rare* occasions when necessary to correct procedural flaws in the *system* of justice rather than to be routinely employed as a second mode of appeal to correct alleged flaws in the *judgment* of counsel. Recent decisions of this Court have also recognized the imperative to restrict the overextension of federal habeas corpus review.⁴

⁴ There were nearly 7,800 habeas filings by state prisoners in federal courts in the year ending June 1981. This figure does not take into account the number of appeals filed in the federal appellate courts from denials by the federal district courts. Remarks of the Honorable William French Smith, Attorney General of the United States, to the Conference of Chief Justices, January 30, 1982. Clearly such a swelling of federal court dockets has the real

[Footnote continued]

Habeas relief should be reserved only for the most deserving defendants with a focus on whether the individual petitioner deserves relief for the most exigent of reasons. *Wainwright v. Sykes*, 433 U.S. 72 (1977) (relief to prevent a true "miscarriage of justice"); *United States v. Williams*, 544 F.2d 1215 (4th Cir. 1976) (relief viewed as exercise of "extraordinary power which must be regarded as an exception to the rule"). The same founding fathers who expressly mentioned the Great Writ in the Constitution also firmly chose federalism as the dominant structure of our government. Clearly, overextension of the writ to include circumstances for which it was never intended will in the long run serve to weaken both the writ itself and our system of criminal justice. Hence, a substantial number of duplicative, overlapping and repetitive reviews of state criminal decisions in the federal courts, a fact of life at present, unduly prolong and improperly call into question state criminal proceedings without furthering the historic purposes of the writ.

For all of these reasons, *amicus curiae* Washington Legal Foundation submits that sound public interest considerations dictate the reversal of the Court of Appeals decision to grant Respondent habeas corpus relief. Rejecting the findings of four state courts and the federal district court in order to expostulate its own longwinded constitutional theory of ineffectiveness of counsel, the court's action typifies the abuse of Section 2254 review of capital punishment cases and the tremendous burden it places on the entire criminal justice system. Justice Powell recently told what was formerly the same circuit that such an abuse of process is a "malfunction of our system of justice." He emphasized that unwarranted federal court intrusion:

potential for eroding the quality of justice. Further, the ever-increasing number of meritless petitions for habeas corpus relief only serves to bury the more meritorious claims and creates a disincentive for courts to separate such petitions from the rest of the pile.

diserves the public interest in the implementation of lawful sentences [and] undermines public confidence in our system of justice and the will and ability of the courts to administer it.

Eleventh Circuit Conference, Savannah, Georgia, May 8-10, 1983. This Court must finally put a stop to the "mal-function" of our justice system. The time has come for this Court to signal that law-abiding members of society, as well as the criminals, have rights which deserve adequate protection.

CONCLUSION

For all of the foregoing reasons, the Washington Legal Foundation submits that this Court should reverse the ruling of the former Fifth Circuit Court of Appeals.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1983

CHARLES E. STRICKLAND, SUPERINTENDENT,
FLORIDA STATE PRISON, ET AL., PETITIONERS

v.

DAVID LEROY WASHINGTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FORMER FIFTH CIRCUIT (UNIT B)

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING PETITIONERS

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QUESTION PRESENTED

The United States will address the following question:

Whether a defendant is constitutionally entitled to a new trial on account of his attorney's asserted ineffectiveness in failing to investigate and present certain evidence at trial, without demonstrating that the additional evidence probably would have affected the outcome of the trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1554

CHARLES E. STRICKLAND, SUPERINTENDENT,
FLORIDA STATE PRISON, ET AL., PETITIONERS

v.

DAVID LEROY WASHINGTON

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FORMER FIFTH CIRCUIT (UNIT B)*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

Claims of ineffective assistance of counsel are raised with increasing frequency in federal criminal cases, and the principles laid down in this case are likely to govern the disposition of such claims.

STATEMENT

1. Respondent pleaded guilty in Florida state court to three counts of murder in the first degree and related charges in connection with three brutal killings in late September 1976. First, according to a prearranged plan, an accomplice induced Daniel Pridgen, a minister, to engage in homosexual activities in the latter's apartment. Respondent entered the apartment after Pridgen was undressed and in bed. While the accomplice covered Pridgen's face with a pillow and held him helpless, respondent stabbed Pridgen 11 times. Respondent and the accomplice then searched for money in Pridgen's apart-

ment, painted slogans on the wall to suggest that the killing was the work of a homosexual lover, wiped their fingerprints from surfaces, and stole some jewelry, a small amount of cash, and Pridgen's car (J.A. 28-30, 51, 83-87, 111-147, 155-161).

Three days later, respondent went to the residence of Katrina Birk, where her three elderly sisters-in-law were visiting while her husband was in the hospital. When, after a period of surveillance, he observed that the four women were together in one room, respondent entered the house and bound the women. When he saw Mrs. Birk inching toward the kitchen, respondent shot her in the head and repeatedly stabbed her, causing her death. He then shot the other victims in the head, stabbed them, and fled with a small amount of money. One of the sisters-in-law remained comatose as a result of knife wounds and subsequently died, and another was permanently blinded (J.A. 33-38, 87-92, 162-182, 189-218, 223-236).

Four days after the murder of Mrs. Birk, respondent contacted Frank Meli, a 20-year old college student, in response to Meli's newspaper advertisement offering a car for sale. Pursuant to a preconceived plan, respondent persuaded Meli to go to respondent's home to obtain the purchase money. Once inside, respondent bound Meli to a bed. Respondent subsequently sold Meli's car and forced him to telephone his family to request a ransom. Three days after the kidnapping, respondent stabbed Meli 11 times while he was tied to the bed and a companion covered his face with a pillow. Respondent then went to an intersection where he had arranged to pick up the ransom money, but left after determining that the police were watching the area. Respondent disposed of the proceeds of the sale of Meli's car by buying a motorcycle, paying off his accomplices, entertaining himself at the dog track, and, apparently, giving some money to his wife (J.A. 39-48, 65-66, 92-100, 146-147, 237-310). See *Washington v. State*, 362 So. 2d 658, 660-661 (Fla. 1978).

2. a. On October 1, 1976, following the arrest of his companions in the Meli case, respondent surrendered to police. After being advised of his rights and choosing to speak without the presence of an attorney, respondent gave a detailed confession to the Meli murder. Attorney William Tunkey, who had extensive experience in more than 500 criminal cases (J.A. 424), was appointed to represent him. Tunkey was regarded by the state sentencing judge as "highly competent" (J.A. 54; see also J.A. 448) and by the judge who presided at the state collateral proceedings as "one of the leading criminal defense attorneys in Dade County" (Pet. App. A216). While he was in jail on the Meli charges, respondent was informed that he was suspected of having committed the Pridgen and Birk murders as well. Respondent initially denied the accusations. But after being informed that an accomplice had told police about the murders, respondent, against Tunkey's advice (J.A. 22, 24), chose to speak to police without the presence of an attorney and confessed in detail to the murders.

On December 1, 1976, again against Tunkey's advice, respondent pleaded guilty to all of the charges. Respondent acknowledged at the guilty plea hearing, as he had in his confession (J.A. 200-202), that he had committed a string of burglaries and had been selling stolen merchandise to the Birks (J.A. 37). Respondent also admitted that he planned to kill Pridgen before he entered the apartment (J.A. 51). He stated, however, that he did not at first intend to kill Mrs. Birk or Meli, and that he was in financial difficulty because he was out of a job and his wife had just had a baby (J.A. 36, 50-53, 65-66). Respondent also stated that he could not have had a better lawyer than Tunkey, but that he did not believe there was any basis on which Tunkey could contest the charges (J.A. 54-56). See 362 So. 2d at 662; J.A. 24-25, 140-144, 152-153, 387, 399, 400.

b. Following a sentencing hearing, the court sentenced respondent to death on each of the first degree murder convictions. The court found four statutory aggravating

factors present in all three murders, concluding that each was (i) "especially heinous, atrocious, or cruel," (ii) "committed for pecuniary gain," (iii) committed while respondent was engaged in another violent crime (robbery, burglary, or kidnapping), and (iv) committed for the purpose of avoiding or preventing arrest. Fla. Stat. Ann. § 921.141(5) (d), (e), (f) and (g). The court also found in the Birk case that respondent knowingly had created a great risk of death to many persons by stabbing and shooting Mrs. Birk's sisters-in-law. Fla. Stat. Ann. § 921.141(5) (c). See 362 So. 2d at 662-664.

Tunkey urged as statutory mitigating circumstances that respondent had no significant history of prior criminal activity, that he was acting under the influence of extreme mental or emotional disturbance, and that he was 26 years of age (J.A. 334). See Fla. Stat. Ann. § 921.141(5) (a), (b) and (g). In addition, Tunkey urged the court to consider that respondent had surrendered to police, confessed his culpability, voluntarily entered guilty pleas, offered to testify against his accomplices, and not tried to escape following his arrest (J.A. 335-336). The court, however, explicitly found no statutory mitigating factor for any of the murders¹ and held that any other mitigating circumstances were insufficient to outweigh the aggravating circumstances. 362 So.2d at 663-664. The Florida Supreme Court affirmed these holdings and upheld the sentences (*id.* at 665-667), and this Court denied certiorari (441 U.S. 937 (1979)).

¹ The court noted that respondent had admitted to engaging in a course of burglaries and dealing in stolen property, thereby rendering inapplicable the statutory factor of an absence of prior criminal activity. The court also found that respondent was not acting under extreme mental or emotional disturbance and that his ability to conform his conduct to the law was not substantially impaired; that the victims had not participated in or consented to the acts; that respondent's participation in the crimes was not insignificant; and that his age could not be considered in mitigation, especially in view of his acts in planning and perpetrating the crimes and disposing of the proceeds. Fla. Stat. Ann. § 921.141(5) (b)-(g). See 362 So.2d at 662-664.

3. Respondent then filed a motion for post-conviction relief in state court, contending that Tunkey had rendered ineffective assistance. The state court held that in order to obtain relief under controlling Florida precedent, respondent had to prove (i) "a substantial and serious deficiency measurably below that of competent counsel," and (ii) "a likelihood that the deficient conduct affected the outcome of the court proceedings" (Pet. App. A213-A214, quoting *Knight v. State*, 394 So. 2d 997, 1000-1001 (Fla. 1981)). The court observed that the aggravating circumstances in this case were "simply overwhelming" and that respondent did not contend that Tunkey was ineffective in failing to rebut them or in failing to present evidence of any statutory mitigating circumstances (Pet. App. A216-A218).

Respondent did contend, however, that Tunkey was ineffective in not conducting an investigation of certain *nonstatutory* mitigating factors: his allegedly difficult childhood, lack of a job, new baby, and need for money. The court concluded, however, that many of these considerations in fact had been made known to the sentencing judge and that, in any event, none of Tunkey's alleged failings constituted a serious deficiency because various circumstances suggested valid tactical grounds for his actions (Pet. App. A224, A226, A228, A229-A230). The court further found "beyond any doubt" that "there is not even the remotest chance that the outcome would have been any different" if Tunkey had taken the measures respondent identified (*id.* at A231). The Florida Supreme Court unanimously affirmed the trial court's findings and denial of relief (*id.* at A248-A250).

4. Respondent then sought habeas corpus relief in the United States District Court for the Southern District of Florida. After a hearing, the district court denied relief (Pet. App. A253-A295). The court concluded that Tunkey had made an error of judgment in not conducting an investigation of family, friends and medical experts (*id.* at A282-A283). But the court found that there was not "a likelihood, or even a significant possibility that the

balancing of aggravating against mitigating circumstances under the Florida death penalty statute would have been altered in [respondent's] favor" if Tunkey had done so (*id.* at A286). "Critically," the court observed, "the character and medical testimony cannot reasonably be characterized as evidence of extreme mental or emotional disturbance"—the relevant statutory mitigating factor—and does not "provide persuasive rationalization for [respondent's] extended and calculated course of violence" (*ibid.*).

5. A divided en banc court of appeals vacated and remanded for further proceedings (Pet. App. A1-A205). The court noted that although the district court concluded that Tunkey committed an error of judgment, it stopped short of finding him ineffective (*id.* at A16). The court of appeals believed that Tunkey might have made a legitimate tactical decision to introduce limited character evidence at the plea colloquy and thereafter to rely on expressions of frankness, sincerity, and remorse—a course that would have made extensive investigation into respondent's background unnecessary (*id.* at A24-A28). The court therefore remanded for further proceedings on the question whether Tunkey had made such a legitimate tactical choice (*id.* at A54-A55, A81-A82).

The court of appeals made clear that, in order to obtain relief, respondent also would have to demonstrate some degree of prejudice by showing that counsel's errors "resulted in actual and substantial disadvantage to the course of his defense." If respondent carried this burden, the State then could attempt to show that the error was harmless beyond a reasonable doubt (Pet. App. A75-A76). In formulating this test, the court declined to follow the decision of the District of Columbia Circuit in *United States v. Decoster*, 624 F.2d 196 (en banc), cert. denied, 444 U.S. 944 (1979), and the Florida Supreme Court's decision in *Knight v. State*, *supra*, which require the defendant to demonstrate a likelihood that counsel's errors had an effect on the outcome of the proceedings (Pet. App. A71-A72).

SUMMARY OF ARGUMENT

A claim of ineffective assistance of counsel has two necessary and independent elements: (1) proof that the attorney's performance fell measurably below the range of competence demanded of defense counsel, and (2) a showing that substantial prejudice resulted. In this case, relief must be denied for failure to satisfy the prejudice element, without regard to whether counsel performed in a reasonably competent manner.

I

A. The requirement that prejudice be shown in order to obtain relief on a claim of ineffective assistance of counsel is solidly grounded in this Court's precedents. Sixth Amendment cases in which the Court has reversed convictions without a specific inquiry into prejudice are readily distinguishable, because they involved either a total denial of counsel or restraints on counsel's independence and undivided loyalty that are essential attributes of the Sixth Amendment guarantee. In addition, where, as here, a claim of ineffective assistance of counsel is raised on collateral attack, a requirement that prejudice be shown is compelled by the "cause and actual prejudice" standard of *Engle v. Isaac*, 456 U.S. 107 (1982), and *United States v. Frady*, 456 U.S. 152 (1982).

B. The nature of the prejudice inquiry may vary depending upon the particular type of error counsel is accused of having committed. In this case, there is a readily available standard particularly adapted to respondent's claim. Because the failing identified by respondent is that additional evidence should have been presented by his attorney at trial, the appropriate showing of prejudice is the one universally accepted as necessary to obtain a new trial on the basis of newly discovered evidence: that the evidence would probably result in an acquittal (or, here, in a sentence of life imprisonment). While it may be appropriate in ineffective assistance cases to waive the customary requirement that such evidence must be shown

not to have been discoverable prior to trial in the exercise of due diligence, there is no reason—at least in the ordinary, non-capital case—why the quantum of prejudice required for relief should be relaxed.

Even if a lesser showing were thought appropriate because of a special sensitivity in capital cases, it at least would be necessary for the defendant to show that the new evidence creates a reasonable doubt about the validity of the judgment that did not previously exist. Cf. *United States v. Agurs*, 427 U.S. 97, 112-113 (1976). Relief must be denied here even under this standard, because the state courts found “beyond any doubt” and “to the point of a moral certainty” that there was no likelihood of an effect on the outcome if Tunkey had done the things respondent suggests (Pet. App. A231, A250), and the district court also found no likelihood that the outcome would have been altered if he had done so (*id.* at A286). No colorable basis exists for overturning those conclusions.

II

Whether an attorney's errors caused his performance to fall measurably below the range of competence demanded of attorneys in criminal cases should be determined, at least as an initial matter, in objective terms. If the defendant asserts that counsel committed legal errors, the defendant first should be required to show that the legal right involved was clearly established at the time of counsel's actions (cf. *Harlow v. Fitzgerald*, No. 80-945 (June 24, 1982)) and was of substantial importance to the outcome of the case. By the same token, where, as here, the defendant asserts that counsel should have investigated certain matters and thereby produced additional evidence at trial, the defendant should be required to satisfy a comparable threshold burden by showing that such an investigation was equivalent, in its degree of obviousness and likelihood of proving fruitful, to the vindication of a clearly settled legal right that was of substantial importance in the case.

ARGUMENT

Introduction

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." In this case, as in *United States v. Cronin*, cert. granted, No. 82-660 (Feb. 22, 1983), the explicit Sixth Amendment guarantee was satisfied: respondent had the assistance of William Tunkey, "one of the leading criminal defense attorneys in Dade County" (Pet. App. A216). Respondent nevertheless contends that the assistance Tunkey rendered was constitutionally inadequate. He of course does not maintain that Tunkey was ineffective in failing to establish his innocence. Respondent voluntarily gave detailed confessions to the murders and, against Tunkey's advice, pleaded guilty to them. Respondent does contend, however, that Tunkey rendered ineffective assistance in connection with the sentencing phase of the case. It is useful to place this claim in perspective under the Florida capital sentencing procedure.

There is no suggestion that Tunkey could have rebutted the existence of any of the statutory aggravating circumstances the state trial and supreme courts found with respect to each murder, since respondent's detailed confessions and guilty pleas effectively conceded the factual basis for each of those aggravating circumstances. Moreover, the sentencing judge found no statutory mitigating circumstances in any of the murders (362 So.2d at 662-664), and, on collateral attack, the state courts and federal district court all held that the additional evidence respondent now contends Tunkey should have explored would not have shown the existence of any statutory mitigating circumstances (Pet. App. A217-A218, A248-A250, A276, A286). Respondent's claim therefore is that Tunkey was ineffective because he did not develop evidence in support of arguments in mitigation that are not specifically listed in the statute but that, he contends, might have influenced the sentencing judge. While the

defendant is entitled to have nonstatutory mitigating circumstances considered (*Lockett v. Ohio*, 438 U.S. 586 (1978)), a claim resting solely on such factors is considerably attenuated, because it is the statutory mitigating factors—entirely absent here—that are the principal ones to be taken into account under state law. See *Songer v. State*, 365 So. 2d 696, 700 (Fla. 1978); *Armstrong v. State*, 429 So. 2d 287, 288-289 (Fla. 1983). Cf. *Eddings v. Oklahoma*, 455 U.S. 104, 114-115 (1982). Accordingly, in light of the overwhelming aggravating circumstances present in this case, the state courts and federal district court properly rejected respondent's collateral attack on his sentence—unless respondent was entitled to relief even though correction of his attorney's alleged omissions could not have affected the outcome of the proceeding. We submit that relief is not available in such circumstances.

As we explain in *United States v. Cronin* (U.S. Br. at 32-33, 35, 47 and Apps. B and C (No. 82-660, 1983 Term)), the federal courts of appeals generally have identified (albeit it in varying terms) two necessary and independent showings that must be made in order to obtain relief on the basis of ineffective assistance of counsel. The defendant must show (1) that his attorney committed significant errors that caused his performance to fall measurably below the range of competence demanded of defense counsel, and (2) that he was prejudiced as a result. Like the "cause" and "actual prejudice" standards for obtaining relief on collateral attack on a claim not raised at trial, the two prongs of the ineffective assistance of counsel test are in the conjunctive, and relief therefore must be denied if the defendant fails to satisfy either. Compare *Engle v. Isaac*, 456 U.S. 107, 134-135 & n.43 (1982), with *United States v. Frady*, 456 U.S. 152, 168, 175 (1982). And as with the "cause" and "actual prejudice" standards, there is no particular order in which the range-of-competence and prejudice elements of an ineffective assistance of counsel claim must be explored. Because, in our submission, respondent cannot prevail even if his attorney's performance was defective, since

any defects could not have affected the outcome of the sentencing proceeding, we believe it was unwarranted for the court of appeals to remand for further inquiry into the range-of-competence element of respondent's claim. Similarly, there should be no need for this Court to pass upon that complex question in this case.²

Finally, we suggest that any temptation to deal broadly and abstractly with the general subject of ineffective assistance of counsel should be resisted. The content of the "prejudice" and "range-of-competence" components of such claims may well vary depending upon the type of dereliction with which counsel is charged. In this case, attention is best focused upon the particular type of claim asserted, *i.e.*, the failure of counsel to adduce additional evidence. As we argue below, that type of alleged defect in counsel's performance cannot justify setting aside the result of the trial unless a sufficient probability is demonstrated that the outcome of the proceeding would have been affected if the additional evidence had been developed.³

² We endorse the analysis in Judge Hill's dissenting opinion regarding this point (Pet. App. A195-A203).

³ Two other characteristics of this case that could influence the Court's analysis should be noted. First, although the court of appeals did not believe that different standards were applicable here because this is a capital case (Pet. App. A21-A22 n.12), it seems to us entirely possible that the evaluation of respondent's claim would be affected by that factor. Such a view has been endorsed in other contexts by this Court (see, *e.g.*, *Zant v. Stephens*, No. 81-89 (June 22, 1983), slip op. 22; *Eddings v. Oklahoma*, 455 U.S. 104, 110-112 (1982)), and it is certainly arguable that capital cases demand special efforts by counsel and special sensitivity by courts to the impact of counsel's actions. Cf. 18 U.S.C. 3005 (derived from Section 29 of the Act of Apr. 30, 1790, ch. 9, 1 Stat. 118), which provides for two attorneys for defendants in capital cases. Second, this case involves a challenge only to the sentence, and not to the underlying conviction. Because resentencing is generally less burdensome than retrial, the government's interest in the finality of its judgments may weigh less heavily in this context.

For the reasons discussed in the text (see pages 25-26, *infra*), however, any special weight that might be given to these two factors

I. WHERE A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS BASED ON COUNSEL'S ALLEGED FAILURE TO INVESTIGATE AND DEVELOP EVIDENCE TO BE PRESENTED AT TRIAL, THE DEFENDANT MUST DEMONSTRATE THAT THE EVIDENCE PROBABLY WOULD HAVE AFFECTED THE OUTCOME OF THE PROCEEDINGS

A. The Court Of Appeals Correctly Held That A Showing Of Prejudice Is An Essential Element Of An Ineffective Assistance Of Counsel Claim

The court of appeals was correct in holding that a finding of substantial prejudice is required in order for a court to grant relief on a claim of ineffective assistance of counsel, although the court erred in its formulation of the prejudice element (see pages 23-24, *infra*). As respondent concedes, the requirement of a showing of prejudice "is solidly grounded in this Court's precedent" (Br. in Opp. 13). Under *United States v. Morrison*, 449 U.S. 361, 365 (1981), if asserted defects in defense counsel's performance did not have an "impact on the criminal proceeding, * * * there is no basis for imposing a remedy in that proceeding." See also *Chambers v. Maroney*, 399 U.S. 42, 53-54 (1970); *Morris v. Slappy*, No. 81-1095 (Apr. 20, 1983), slip op. 9-10; *id.* at 12-13 (Brennan, J., concurring). And under *United States v. Frady*, where, as here, the defendant raises matters on collateral attack that were not presented at trial, he must demonstrate "actual prejudice" to obtain relief. 456 U.S. at 168. Although respondent appears to concede the point, we undertake a brief discussion of the prejudice requirement for the light it sheds on the nature of the showing of prejudice required.

1. This Court's decisions in *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Geders v. United States*, 425 U.S. 80 (1976); and *Cuyler v. Sullivan*, 446 U.S. 335 (1980), do not suggest that a showing of prejudice is unnecessary

is insufficient to support the result reached by the court of appeals in the circumstances shown by the record of this case.

in an ineffective assistance of counsel case. The action of the state in imprisoning a convicted defendant who has been totally denied counsel in violation of *Gideon* is so fundamentally incompatible with basic fairness that courts will not conduct an inquiry into whether the outcome of the trial was affected by the absence of counsel in the particular case (Pet. App. A58, citing *Chapman v. California*, 386 U.S. 18, 43 (1967) (Stewart, J., concurring)). No comparable state action is involved when the claim is that the lawyer who was provided was, through no fault of the state, ineffective.

In *Geders* and related cases, such as *Herring v. New York*, 422 U.S. 853 (1975), and *Brooks v. Tennessee*, 406 U.S. 605 (1972), the government affirmatively interfered with the relationship between attorney and client or with counsel's freedom of action in conducting the defense, both of which are essential attributes of the assistance of counsel guaranteed by the Sixth Amendment. Similarly, a finding that counsel labored under an actual conflict of interest that adversely affected his performance establishes that the attorney did not adhere to the duty of undivided loyalty to his client that also is an essential attribute of the Sixth Amendment guarantee. Because of the subtle but pervasive effect of conflicting loyalties upon an attorney, an inquiry into what prejudice resulted may be little more than "unguided speculation." *Holloway v. Arkansas*, 435 U.S. 475, 491 (1978). See also Pet. App. A57-A60; *United States v. Decoster*, 624 F.2d at 201 (plurality opinion of Leventhal, J.); *Cooper v. Fitzharris*, 586 F.2d 1325, 1331-1333 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979).

Cases involving allegations that an attorney who was unencumbered by such inhibitions upon his independence and loyalty nonetheless made a mistake in his handling of the case are materially different. "Every trial presents a myriad of possible claims," and it is virtually inevitable that counsel in any given case will overlook or choose to omit certain claims while pursuing others. *Engle v. Isaac*, 456 U.S. at 128-129 & n.34, 133-134. No funda-

mental unfairness results when this occurs, and the Court has made clear that the Constitution does not require that counsel recognize and raise every potentially meritorious claim. *Id.* at 134; *Wainwright v. Sykes*, 433 U.S. 72, 91 (1977); *Estelle v. Williams*, 425 U.S. 501, 512-513 (1976); *id.* at 514-515 (Powell, J., concurring); cf. *Jones v. Barnes*, No. 81-1794 (July 5, 1983). Only if counsel's errors were of sufficient magnitude to undermine the fairness of the proceedings—i.e., only if they were equivalent in their severity to an actual denial of the "Assistance of Counsel" to which the Sixth Amendment explicitly refers—is a Sixth Amendment violation established.⁴

Nor does an inquiry into whether prejudice resulted require "unguided speculation," as in the conflict of interest cases. A claim of ineffective assistance of counsel necessarily is based on identifiable acts or omissions by the attorney that the defendant asserts reasonably competent counsel would not have committed. Pet. App. A61; *Cooper v. Fitzharris*, 586 F.2d at 1331; *Morris v. Slappy*, slip op. 12-13 (Brennan, J., concurring). A reviewing court can assess the probable impact of those errors in the proceedings, just as courts routinely assess the impact of other errors that the defendant does *not* attribute to the incompetence of his attorney.

Moreover, as the court of appeals observed (Pet. App. A64), a requirement that prejudice be shown is appropriate in ineffective assistance of counsel cases because

⁴ In our brief in *United States v. Cronin* (U.S. Br. 25-30, 33-34), we discuss in some detail the historical evolution of the judicially fashioned right to "effective" assistance of counsel, beginning with *Powell v. Alabama*, 287 U.S. 45 (1932), and explain why claims of a Sixth Amendment violation based on assertedly incompetent assistance of counsel must be comparable in their level of severity to an actual denial of counsel. We also explain in that brief (U.S. Br. 34) why this Court's decision in *McMann v. Richardson*, 397 U.S. 759 (1970), supports this position, and identify (U.S. Br. 16-25) a number of other considerations that further reinforce this conclusion. We will not repeat that discussion here.

neither the prosecution nor the court is responsible for the alleged defects in the proceedings. This conclusion would seem to follow a fortiori from cases such as *United States v. Agurs*, 427 U.S. 97, 111 (1976), and *United States v. Valenzuela-Bernal*, No. 81-450 (July 2, 1982), slip op. 7, 10, 14-15; *id.* at 2, 5 (O'Connor, J., concurring), in each of which the Court considered the prejudicial impact on the outcome of the proceedings even though the government *was* responsible for the deficiency. See also *United States v. Green*, 680 F.2d 183, 188-189 (D.C. Cir. 1982), cert. denied, No. 82-5552 (Feb. 22, 1983); *Decoster*, 624 F.2d at 214 (plurality opinion). Where there has been no arguable government misconduct, setting aside a conviction without a showing of prejudicial impact on the outcome of the proceedings therefore cannot be justified on the ground that it would deter constitutional violations; to do so would simply bestow a windfall on a defendant who was not injured by counsel's conduct.

2. The requirement of a concrete showing of prejudice has particular force where, as here, the ineffective assistance of counsel claim is raised in a collateral attack on the conviction. If counsel fails to take certain actions at trial, the substantive defects in the proceedings that result from counsel's failure may be raised on collateral attack only if the defendant satisfies the "cause" and "actual prejudice" standards of the line of cases culminating with *Engle v. Isaac* and *United States v. Frady*. If a lesser showing were required for ineffective assistance of counsel claims, the convicted defendant would be encouraged to raise his substantive claims indirectly rather than forthrightly, recasting them as attacks on his attorney's performance in causing the trial error or allowing it to go uncorrected. See Pet. App. A67-A68; *Decoster*, 624 F.2d at 207 (plurality opinion); *Cooper v. Fitzharris*, 586 F.2d at 1333; Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work To Do*, 31 Stan. L. Rev. 1, 60-61 (1978). Such an approach would vitiate the cause-

and-prejudice standard. It also would improperly deflect the court's attention from the central question on collateral review— whether there was fundamental unfairness to the accused in light of the error that assertedly occurred at trial⁵—to a more peripheral concern with the lawyer's actions and thought processes in connection with that error and, all too frequently, a separate trial of the attorney's performance.⁶

It is also significant in this case that there is no constitutional requirement that the State furnish an opportunity to present new evidence on the question of guilt or sentence for a defendant whose judgment of conviction has become final. As a result, a state prisoner cannot obtain federal habeas corpus relief on the basis of newly discovered evidence unless that evidence bears upon the constitutionality of his detention. *Townsend v. Sain*, 372 U.S. 293, 317 (1963).⁷ Requiring a state prisoner to show substantial prejudice in order to obtain habeas corpus relief on the basis of such evidence when its absence at trial is attributed to errors by counsel serves

⁵ *Engle v. Isaac*, 456 U.S. at 134; *Wainwright v. Sykes*, 433 U.S. at 90-91. Cf. *Cuyler v. Sullivan*, 446 U.S. at 343, 348.

⁶ Similar considerations arise on direct appeal in the federal system. If the particular issue was not raised in the trial court, the conviction may be set aside on appeal only upon a finding of plain error affecting substantial rights. Fed. R. Crim. P. 52(b). This remedy is available only in exceptional circumstances, in order to avoid a miscarriage of justice. *United States v. Frady*, 456 U.S. at 163 & nn.13 & 14; *United States v. Atkinson*, 297 U.S. 157, 160 (1936). In those few cases in which a claim of ineffective assistance of counsel might be considered on direct appeal because the claim does not turn on matters outside the record, to dispense with the prejudice element would mean that the strict standard used to review issues raised for the first time on direct appeal could be circumvented by couching the issue as an ineffective assistance of counsel claim. See *Cooper v. Fitzharris*, 586 F.2d at 1333.

⁷ Collateral relief likewise is not available under 28 U.S.C. 2255 on the basis of newly discovered evidence; such a claim must be brought within two years under Fed. R. Crim. P. 33. See 8A J. Moore, *Moore's Federal Practice* ¶ 33.02[3][a], at 33-12 to 33-13 (2d ed. 1982).

to ensure that nonconstitutional newly discovered evidence claims are not too readily transformed into Sixth Amendment ineffective assistance of counsel claims in order to obtain collateral relief. See, e.g., *Baumann v. United States*, 692 F.2d 565, 578-581 (9th Cir. 1982).

Quite aside from this potential for circumvention, there is no basis in law or logic for dilution of the "actual prejudice" requirement where the defendant attacks his lawyer's performance. The governmental interest in enforcing procedural rules to maintain the finality of a judgment of conviction is as weighty when defense counsel could be regarded as blameworthy for not complying with those rules as it is when counsel could not be faulted by his client or a neutral observer (because, for example, he made a reasonable tactical choice). Cf. *Agurs*, 427 U.S. at 110; *Smith v. Phillips*, 455 U.S. 209, 219 (1982). Indeed, it is self-evident that the efficacy of contemporaneous objection rules and like principles governing the conduct of criminal prosecutions depends on the premise that a party to litigation and his attorney are to be regarded as one, and the "actual prejudice" requirement clearly applies where the failure to raise an issue at trial is attributable to counsel. See, e.g., *Engle v. Isaac* and *United States v. Frady*, *supra*. While a claim of attorney incompetence, if substantiated, arguably might satisfy (or excuse) the requirement of showing "cause" for the procedural default (see, e.g., *Pickens v. Lockhart*, No. 82-1836 (8th Cir. Aug. 12, 1983) (slip op. 23)), it is utterly illogical to permit it to have any bearing on the "actual prejudice" component of the test.

This case implicates a principle of both criminal and civil litigation that is even more fundamental than contemporaneous objection and like procedural rules: that all relevant evidence should be presented by the parties at the trial itself, and that a judgment entered at the close of the evidence therefore should not lightly be disturbed simply because additional evidence has become available to one of the parties. This principle likewise

does not lose its force whenever the party seeking relief from the judgment chooses to blame his attorney for the failure to produce the evidence at the time of trial. Accordingly, a valid judgment should not be set aside in such circumstances absent a showing of substantial unfairness or prejudice to the accused that outweighs the interest in finality.

B. Relief Cannot Be Granted Unless The Court Finds That Counsel's Failure To Investigate Certain Matters And Produce Evidence At Trial Probably Affected The Outcome Of The Proceedings

1. We have argued above (see pages 15-16, *supra*) and in our brief in *United States v. Cronin* (U.S. Br. 18, 22, 32, 34, 46-47) that a court considering an ineffective assistance of counsel claim should focus on the nature of the particular defect in the proceedings that is said to have resulted from counsel's assertedly inadequate performance. This is so because the ultimate inquiry must be into whether the *accused* received a fair trial in light of any errors that were caused or uncorrected by counsel, not the performance of the *lawyer* in its own right. Accordingly, the showing of prejudice that must be made in any given case should be determined, at least in the first instance, by reference to the showing of prejudice that would be required to obtain relief from the particular substantive defect in the proceedings that is alleged to have resulted from counsel's actions.

In this case, the trial defect alleged by respondent is that additional evidence should have been presented on a particular issue—the possible mitigation of sentence. American courts long have agreed upon a set of principles to be applied in determining whether a valid judgment should be set aside when one of the parties proffers new evidence relevant to an issue in the original proceedings. Those principles embody a virtually unanimous consensus regarding the appropriate balance to be struck between enforcing the fundamental principle

that the trial itself is the "decisive and portentous event" ⁸ at which the parties are to present all relevant evidence on the issues in the suit, and yet providing a safety valve to prevent an obvious injustice when new evidence has come to light after judgment has been entered.⁹ We submit that this deeply entrenched consensus also is the proper source of guidance in fashioning the standard of prejudice here.

The essential elements for obtaining a new trial on the basis of newly discovered evidence are: (1) the evidence is in fact newly discovered and was unknown to the defendant at the time of trial; (2) failure to learn of the evidence at the time of trial was not the result of a lack of due diligence; (3) the evidence is material to the issues at trial, and is not merely cumulative or impeaching; and (4) the evidence probably would produce an acquittal in the event of a retrial. These requirements are uniformly followed by the federal courts of appeals with respect to new trial motions under Fed. R. Crim. P. 33¹⁰ and are generally applied by state courts, includ-

⁸ *Wainwright v. Sykes*, 433 U.S. at 90.

⁹ *United States v. Johnson*, 327 U.S. 106, 112 (1946); see also 1 D. Graham & T. Waterman, *A Treatise on the Law of New Trials* 4-9 (2d ed. 1855); *id.*, Vol. 3, at 805, 1016, 1020-1021, 1026-1027, 1043-1044, 1085-1086; 8A *Moore's Federal Practice*, *supra*, ¶ 33.03[1], at 33.17; 3 C. Wright, *Federal Practice and Procedure* § 557, at 315 (2d ed. 1982).

¹⁰ *United States v. Mangieri*, 694 F.2d 1270, 1285 (D.C. Cir. 1982); *United States v. Martorano*, 663 F.2d 1113, 1119 (1st Cir. 1981), cert. denied *sub nom. Goldenberg v. United States*, No. 81-1389 (Feb. 28, 1983); *United States v. Alessi*, 638 F.2d 466, 479 (2d Cir. 1980); *United States v. Herman*, 614 F.2d 369, 371 (3d Cir. 1980); *Mills v. United States*, 281 F.2d 736, 738 (4th Cir. 1960); *United States v. Burns*, 668 F.2d 855, 859 (5th Cir. 1982); *United States v. Barlow*, 693 F.2d 954, 966 (6th Cir. 1982); *United States v. Oliver*, 683 F.2d 224, 228 (7th Cir. 1982); *United States v. Swarek*, 677 F.2d 41, 43 (8th Cir. 1982), cert. denied, No. 82-175 (Jan. 10, 1983); *United States v. Diggs*, 649 F.2d 731, 739 (9th Cir.), cert. denied, 454 U.S. 970 (1981); *United States v. Cotner*, 657 F.2d 1171, 1173 (10th Cir. 1981).

ing those of Florida.¹¹ 8A J. Moore, *Moore's Federal Practice* ¶ 33.03[1], at 33-18 to 33-19 (2d ed. 1982); 3 C. Wright, *Federal Practice and Procedure* § 557, at 315, 317-328 (2d ed. 1982); 58 Am. Jur. 2d *New Trial* §§ 166-173 (1971). See *Agurs*, 427 U.S. at 111 & n.19; *Mesarosh v. United States*, 352 U.S. 1, 9 (1956); *United States v. Johnson*, 327 U.S. at 110 n.4.¹² The elements of the test for obtaining a new trial on the basis of newly discovered evidence often are traced to the opinion of the Supreme Court of Georgia more than a century ago in *Berry v. State*, 10 Ga. 511 (1851).¹³ But in fact even in 1855 a leading treatise observed that these elements, "founded on solid reasons of utility as well as justice," were "so clear and well settled, that courts scarcely ever need to doubt or hesitate as to their application." 3 D. Graham & T. Waterman, *supra*, at 1021.

It is the fourth element of the newly discovered evidence test set forth above—that the evidence probably would produce an acquittal in the event of a retrial—that

¹¹ Fla. R. Crim. P. 3.600(a) (3) provides that a new trial may be granted if "new and material evidence, that if introduced at the trial would probably have changed the verdict or finding of the court, and that the defendant could not with reasonable diligence have discovered and produced upon the trial, has been discovered." See also *Thomas v. State*, 374 So.2d 508, 515 (Fla. 1979), cert. denied, 445 U.S. 972 (1980).

¹² Strict time restrictions also typically are imposed on such motions. See, e.g., Fed. R. Crim. P. 33 (2 years). Under Fla. R. Crim. P. 3.600, a motion for a new trial on the basis of newly discovered evidence must be made within 10 days after the verdict or finding of the court. Fla. R. Crim. P. 3.590(c). After that period has elapsed, the only available judicial remedy is a writ of error coram nobis, under which the defendant must conclusively establish that the newly discovered evidence would have changed the result. See, e.g., *Smith v. State*, 400 So.2d 956 (Fla. 1981); *Hallman v. State*, 371 So.2d 482 (Fla. 1979). See also *United States v. Johnson*, 327 U.S. at 112 (referring to the 60-day period then allowed in federal cases as an "extraordinary" length of time).

¹³ See *United States v. Johnson*, 327 U.S. at 110 n.4; 8A *Moore's Federal Practice*, *supra*, ¶ 33.03[1], at 33-18 n.4; 3 C. Wright, *supra*, ¶ 557, at 315-316.

in our view defines the showing of prejudice required in an ineffective assistance of counsel case based on counsel's alleged failure to investigate and produce evidence. This requirement is essentially the equivalent of the standard announced by the District of Columbia Circuit in *Decoster*—another case involving an alleged failure to investigate—that the defendant must demonstrate “a likelihood that counsel’s inadequacy affected the outcome of the trial” (624 F.2d at 208 (plurality opinion)).

New trial rules, like other procedural rules governing the conduct of criminal prosecutions, historically have regarded the accused and his attorney as one. Consistent with this principle, relief has been denied if the attorney knew of the evidence at the time of trial but the accused did not, or if the attorney could be charged with a lack of due diligence in failing to discover or produce the evidence at the time of trial.¹⁴ Under Sixth Amendment doctrine, however, there now may be “exceptional” circumstances¹⁵ in which actions by counsel so depart from the range of competence and standards of fairness that define the scope of the agency relationship established by law between the defendant and his attorney in a criminal case that the defendant should not be bound by his attorney’s defaults. Accordingly, where an attorney’s performance in investigation and use of evidence falls measurably below the range of competence demanded of defense counsel, it may be appropriate to dispense with the usual rule in this area that the client is bound by his attorney’s lack of due diligence or knowledge of facts

¹⁴ See 1 D. Graham & T. Waterman, *supra*, at 192-193; *id.*, Vol. 3, at 1025-1026, 1029-1030, 1035, 1105-1106; 3 C. Wright, *supra*, § 557, at 317, 327-329; *United States v. Provenzano*, 620 F.2d 985, 997 (3d Cir.), cert. denied, 449 U.S. 899 (1980); *United States v. Eldred*, 588 F.2d 746, 753 (9th Cir. 1978); *United States v. Atkins*, 545 F.2d 1153, 1154 (8th Cir. 1976); *United States v. Iannelli*, 528 F.2d 1290, 1292-1293 (3d Cir. 1976); *United States v. Bujess*, 371 F.2d 120, 125 (3d Cir. 1967).

¹⁵ See *Wainwright v. Sykes*, 433 U.S. at 91 n.14, quoting *Henry v. Mississippi*, 379 U.S. 443, 451 (1965).

that were not produced at trial. The effect of doing so would simply be to excuse the defendant from satisfying those elements of the newly discovered evidence test that are intended to ensure that the party seeking relief is not himself at fault for failing to produce the evidence at trial.

It is clear, however, that excusing the defendant who raises an ineffective assistance of counsel claim from satisfying the due diligence element of the newly discovered evidence test—on the ground that the client should not be charged with his attorney's serious defaults—furnishes no basis for also dispensing with the distinct requirement that the defendant show that the additional evidence he proffers after judgment probably would produce a different result on retrial. This element is not concerned with the relative fault of the parties. It protects the core interests in repose and finality by assuring that a valid judgment of conviction will not lightly be set aside simply because additional evidence has become available, *irrespective* of the fault of the party seeking relief. Cf. *Agurs*, 427 U.S. at 110.

To be sure, the *Agurs* Court declined to adopt the newly discovered evidence standard in determining when evidence in the possession of the prosecutor was sufficiently material that the Due Process Clause required its disclosure to the defense. But the Court's rationale was that "the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial." 427 U.S. at 111. That rationale has no application here, because there is no suggestion that the prosecution was responsible in any way for the unavailability of the evidence. Indeed, respondent does not even rest his claim for relief on the availability of new evidence from a "neutral source." A necessary element of his ineffective assistance of counsel claim is that the evidence was available or should have been available to his attorney, a participant in the *defense*.

A fortiori, the logic of *Agurs* does not support a departure from the newly discovered evidence test here.

2. The court of appeals in this case specifically declined to follow *Decoster* and to formulate the prejudice element in terms of whether counsel's failure to produce evidence had a likely effect on the outcome, because it believed that such a formulation would require respondent to carry a greater burden than that imposed under the "actual prejudice" standard for raising claims on collateral attack. Drawing on language from *United States v. Frady* (456 U.S. at 170), the court instead stated that respondent must show that counsel's performance resulted in "actual and substantial disadvantage to the course of his defense." Pet. App. A75. If this burden were met, the State then could show that any error that occurred was harmless beyond a reasonable doubt. *Id.* at A76. The court's reasoning was seriously flawed.

Contrary to the court of appeals' belief, the phrase "actual and substantial disadvantage," which the court drew from *Frady*, itself indicates that the inquiry cannot be divorced from the fundamental fairness of the proceedings or the accuracy of the judgment. See, e.g., *Pickens v. Lockhart*, *supra*, slip op. 22, 23-25. Indeed, the Court in *Frady* twice stressed that there was no "substantial likelihood" that the jury would have reached a different result if it had not been given the instruction about which Frady belatedly complained. 456 U.S. at 172, 174. Similarly, in *Wainwright v. Sykes*, upon which the court of appeals also relied in rejecting the *Decoster* approach (see Pet. App. A71), the Court considered the "actual prejudice" element in terms of whether admission of the inculpatory statement at issue had a likely effect on the jury's verdict. 433 U.S. at 91.¹⁶ The Court also has made clear that the nature of

¹⁶ In *United States v. Valenzuela-Bernal*, also relied upon by the court of appeals (see Pet. App. A69, A73-A74), the Court again stressed the importance of finding a "reasonable likelihood" that the evidence could have affected the outcome. Slip op. 15; see also *id.* at 9, 15 n.10.

the showing of "actual prejudice" may vary depending on the underlying substantive claim. *Engle v. Isaac*, 456 U.S. at 129; *United States v. Frady*, 456 U.S. at 168. Here, the underlying claim is essentially equivalent to one of newly discovered evidence. Accordingly, it is entirely appropriate and consistent with this Court's decisions to apply the newly discovered evidence requirement of a probable effect on the outcome.

The court of appeals believed, however, that it would be unfair to require the defendant to bear the burden of showing a probable effect on the outcome, because he is in no better position than the prosecution to demonstrate whether the new evidence would be likely to alter the outcome. See Pet. App. A72. The court lost sight of the fact that it is the *defendant* who is seeking to have a valid judgment set aside because of the availability of new evidence he asserts should have been presented on his behalf at trial. There is nothing unfair in requiring him to demonstrate that there are sufficient grounds for doing so, by showing that the new evidence casts substantial doubt on the validity of the findings underlying that judgment; as we have explained, defendants routinely must carry this burden in newly discovered evidence cases. Conversely, because neither the prosecution nor the court is responsible for the alleged errors by defense counsel, it would be unfair to require, as the court of appeals has done, that the *government* bear the burden on the question of a possible effect on the outcome by demonstrating that counsel's errors were harmless beyond a reasonable doubt.

The only conceivable reason for not requiring a showing of probable effect on the outcome in this case—a reason eschewed by the court of appeals (Pet. App. A21 n.12)—would be that the evidence at issue here is relevant to the imposition of a sentence of death. This Court has stressed that the sentencing court must be free to consider all matters bearing on the defendant's character and record in such a case. *Lockett v. Ohio*, *supra*. But even if this unique and peculiarly sensitive factor places

the evidence at issue in this case in a special category for which the traditional newly discovered evidence standard is inappropriate, as in *Agurs*, the standard of prejudice nevertheless must be tailored to the interest in the justice and accuracy of the findings underlying the judgment that respondent seeks to have set aside. *Agurs*, 427 U.S. at 112. If the *Agurs* test were to be applied for this reason, the relevant inquiry would be whether the additional evidence creates a reasonable doubt about the validity of the judgment that otherwise would not exist. *Id.* at 113. It is clear that respondent is not entitled to relief even under this relaxed standard.

As the state trial court found on collateral review (Pet. App. A231), this was not a close case in which the balance might have been tipped in respondent's favor by additional evidence of nonstatutory mitigating circumstances, which are of secondary significance under Florida law (see page 10, *supra*) and which already were addressed to some extent in the plea colloquy and argument of counsel. The multiple aggravating factors in this case were "simply overwhelming" (Pet. App. A216), and, on collateral attack, the state courts and federal district court found no evidence of *any* statutory mitigating factors in connection with *any* of the murders (*id.* at A217-A218, A248-A250, A256, A286). The Florida trial court, on collateral review, explicitly found "beyond any doubt" that "there is not even the remotest chance that the outcome would have been any different" if Tunkey had done the things respondent suggests (*id.* at A230), because "as a matter of law" the nonstatutory factors in mitigation would "be insufficient to outweigh the multiple aggravating circumstances" (*id.* at A231). The Florida Supreme Court, which reviews every death sentence to assure that the State's capital punishment statute is consistently applied, found "to the point of moral certainty" that respondent was not entitled to relief (*id.* at A250). Cf. *Barclay v. Florida*, No. 81-6908 (July 6, 1983), slip op. 17-18 (opinion of Rehnquist, J.).

These concurrent findings by the state courts, based on the application of state law, must be respected by the federal courts. And indeed the federal district court too found no "likelihood" or "significant possibility" that the balancing of aggravating and mitigating circumstances would have been altered if counsel had performed differently (Pet. App. A286). The judgment of the district court denying habeas corpus relief because of the absence of a showing of prejudice therefore should be reinstated.

II. THE DISTINCT QUESTION OF WHETHER THE ATTORNEY'S PERFORMANCE FELL MEASURABLY BELOW THE RANGE OF COMPETENCE DEMANDED OF DEFENSE COUNSEL SHOULD BE JUDGED, AS A THRESHOLD MATTER, BY AN OBJECTIVE STANDARD

Neither court below resolved the application to this case of the second necessary element of an ineffective assistance of counsel claim: whether the attorney's performance fell measurably below the range of competence demanded of defense counsel. Nor need this Court reach that issue, because, as we show in Point I, relief must be denied here in any event because respondent has failed to make the requisite showing of prejudice. We therefore shall make only a few brief observations regarding the second element.

In *McMann v. Richardson*, 397 U.S. 759 (1970), the Court did not attempt to give precise content to the proposition that relief may be granted in certain instances in which counsel's performance was not "within the range of competence demanded of attorneys in criminal cases." *Id.* at 771.¹⁷ The Court instead concluded

¹⁷ We also note that in *McMann* the issue on which counsel's advice was relevant in connection with the guilty plea—the possible use at trial of an allegedly coerced confession—itself implicated the fairness of the trial and the integrity of the truth-finding process. *Jackson v. Denno*, 378 U.S. 368 (1964). It does not follow from

that the matter for the most part "should be left to the good sense and discretion of the trial courts" (*ibid.*). In one respect, we believe this observation remains true: in a close case, judgment and discretion must play a role in the ultimate determination whether the defendant received a fair trial and reliable verdict in light of counsel's alleged shortcomings. But the close case is not the typical case. With increasing frequency, defendants attack their convictions by attacking their attorneys, often prompting a wide-ranging inquiry into counsel's litigating judgments long after memories have faded. Compare *Harlow v. Fitzgerald*, No. 80-945 (June 24, 1982). We have serious reservations about the wisdom of an approach that would require such an inquiry without compelling reasons.

Unduly intrusive, post-hoc scrutiny of the lawyer's strategy may require an unseemly probing of attorney-client communications and the attorney's thought processes, thereby dampening the ardor of defense counsel, undermining the sense of mutual trust in criminal cases generally, and perhaps discouraging lawyers from accepting appointments in criminal cases. Cf. *Hickman v. Taylor*, 329 U.S. 495, 510-511 (1947); *FTC v. Grolier, Inc.*, No. 82-372 (June 6, 1983). A hearing such as that

McMann that a conviction should be set aside if the assertedly incompetent advice of counsel in connection with a guilty plea concerned matters that do not raise those concerns, such as the admissibility of evidence allegedly seized in violation of the Fourth Amendment. Cf. *Stone v. Powell*, 428 U.S. 465 (1976). For the same reason, it would seem that the principles of *Stone v. Powell* may not be circumvented by asserting on collateral attack that the use at trial of evidence seized in violation of the Fourth Amendment resulted from counsel's incompetence. There may well be additional situations in which countervailing interests in finality, enforcing state procedural rules, or other factors foreclose relief even if the defendant shows that counsel's actions were outside the range of competence demanded of defense counsel and that he suffered prejudice as a result. See Binea, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 Va. L. Rev. 927, 959-970 (1973); cf. *Estelle v. Williams*, 425 U.S. 501, 512-513 (1976); *id.* at 514-515 (Powell, J., concurring).

held in district court in this case also places the attorney in the awkward position of defending himself while not wishing to harm his former client, and it places the prosecutor in the awkward position of defending the litigation judgments of his former adversary.

In many instances, this sensitive and awkward inquiry into counsel's litigation strategy can be pretermitted because application of the proper test of prejudice will make clear that relief cannot be granted whether or not the attorney acted with reasonable competence. Even where that is not so, however, the court should not embark upon a probing inquiry into the attorney's motives and strategy unless it is first shown that the attorney's performance fell outside an *objectively* discernible range of competence. For example, where the defendant asserts that his attorney committed a legal error at trial, such as failing to object to jury instructions, the defendant first should be required to show that the right involved was clearly established under controlling statutory or case law at the time of counsel's actions (*Harlow v. Fitzgerald*, *supra*, slip op. 14-18) and was of substantial importance to the case. Compare *Engle v. Isaac*, 456 U.S. at 130-134; *Jones v. Jago*, 701 F.2d 45, 47 (6th Cir. 1983).¹⁸ A number of considerations in addition to avoiding unnecessary inquiry into counsel's litigating strategy support this requirement.

First, if the right involved did not clearly govern the conduct of criminal prosecutions at the time the defendant was tried, counsel's failure to assert that right does not in itself render the trial fundamentally unfair. Cf. *Engle v. Isaac*, 456 U.S. at 131. This conclusion is consistent with the central role of counsel in criminal cases of enabling the accused to meet the prosecution's case within the

¹⁸ Even then, it often may be unnecessary to require testimony by counsel regarding his actual reasons for pursuing a particular course if a plausible tactical basis reasonably may be ascribed to his actions. Cf. *Estelle v. Williams*, *supra*, 425 U.S. at 508; *Wainwright v. Sykes*, *supra*, 433 U.S. at 96-97 (Stevens, J., concurring).

framework of existing procedures that ordinarily are too complex for an untrained layman to grasp. *United States v. Ash*, 413 U.S. 300, 309 (1973); *Powell v. Alabama*, *supra*, 287 U.S. at 60.

Second, given the subtleties of the art of advocacy, the uncertainties in the future course of the law (see *Harlow v. Fitzgerald*, *supra*, slip op. 17-18; *McMann v. Richardson*, *supra*, 397 U.S. at 771), and the inherent subjectivity of reviewing a lawyer's tactical judgments, an objective benchmark of attorney competence presents the most promising way of assuring some consistency and ease of application of the governing rules. Third, defining the range of competence in this manner as a threshold matter would allow sufficient latitude for counsel to exercise the independent judgment and freedom of action that the Constitution requires. *Polk County v. Dodson*, 454 U.S. 312, 318-319, 321-322 (1981). It also would best effectuate the "presumption that [counsel] was conscious of his duties to his clients and that he sought conscientiously to discharge those duties" (*Mathews v. United States*, 518 F.2d 1245, 1246 (7th Cir. 1975) (Stevens, J.)).

Similar considerations apply where, as here, counsel's alleged errors relate to a failure to investigate and produce evidence, rather than to the handling of legal issues. Accordingly, the defendant should be required to show at the outset that the course he suggests counsel should have followed was equivalent, in its degree of obviousness and likelihood of proving fruitful, to the vindication of a clearly settled legal right that is of substantial importance to the defense of the case. The circumstances present in this case at the time of sentencing, objectively viewed, plainly disclosed no such obvious and substantial likelihood that material evidence would have been developed by the sort of investigation respondent now contends his lawyer should have undertaken. At least in the typical criminal case, the absence of such a likelihood should be a sufficient basis on which to reject

a claim that counsel's performance infected the trial with error of constitutional dimension, without the need for the sort of inquiry into counsel's actual litigation decisions apparently contemplated by the court of appeals' remand order. There is no need to consider whether the capital aspect of this case would suggest a different analysis, because it is in any event clear that respondent is not entitled to relief because of his failure to satisfy the independent prejudice prong of the ineffective assistance of counsel test.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded to the court of appeals with directions to affirm the judgment of the district court.

Respectfully submitted.

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AUGUST 1983

No. 82-1554-CFW
Status: GRANTED

Title: Charles E. Strickland, Superintendent, Florida State
Prison, et al., Petitioners
V.
David Leroy Washington

Docketed:
March 21, 1983

Court: U. S. Court of Appeals for the
Eleventh Circuit (former 5th Circuit)

Counsel for petitioner: Fox, Calvin L.

Counsel for respondent: Shapiro, Richard E.

Entry	Date	Note	Proceedings and Orders
1	Mar 21 1983	G	Petition for writ of certiorari filed.
2	Mar 21 1983		Appendix of petitioner Strickland, Supt. filed.
3	Apr 22 1983		Brief amicus curiae of State of Alabama, et al. filed.
4	May 11 1983		Brief of respondent David Leroy Washington in opposition filed.
5	May 11 1983	G	Motion of respondent for leave to proceed in forma pauperis filed.
6	May 18 1983		DISTRIBUTED. June 2, 1983
7	Jun 6 1983		Motion of respondent for leave to proceed in forma pauperis GRANTED.
8	Jun 6 1983		Petition GRANTED.
10	JUL 6 1983		***** Order extending time to file response to petition until August 11, 1983.
11	AUG 8 1983		Order further extending time to file response to petition until August 18, 1983.
12	AUG 17 1983		Joint appendix filed.
13	AUG 19 1983		Brief amicus curiae of State of Alabama, et al. filed.
14	AUG 18 1983	G	Motion of Washington Legal Foundation for leave to file a brief as amicus curiae filed.
15	AUG 18 1983		Brief amicus curiae of United States filed.
16	AUG 18 1983		Brief of petitioners Strickland, Supt., et al. filed.
17	AUG 31 1983		Record filed.
18	AUG 31 1983		Certified original record & proceedings, 5 vols., received.
20	Sep 26 1983		Order extending time to file response to petition until October 19, 1983.
21	Oct 3 1983		Motion of Washington Legal Foundation for leave to file a brief as amicus curiae GRANTED.
23	Oct 18 1983		Order further extending time to file response to petition until November 18, 1983.
24	Nov 15 1983		Order further extending time to file response to petition until November 29, 1983.
25	Nov 23 1983		SET FOR ARGUMENT. Tuesday, January 10, 1984. (2nd case)
26	Nov 29 1983		Brief of respondent David Leroy Washington filed.
27	Nov 29 1983		Brief amicus curiae of Natl. Legal Aid and Defender Association filed.
28	Dec 8 1983		CIRCULATED.
29	Dec 31 1983	X	Reply brief of petitioners Strickland, Supt., et al. filed.
30	Jan 10 1984		ARGUED.